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WHEN: Tuesday, June 8, 2010
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
800 North Capitol Street, NW.
Washington, DC 20002

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A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Federal Register
Vol. 75, No. 86
Wednesday, May 5, 2010

Presidential Documents

Title 3—

The President

Proclamation 8508 of April 29, 2010

Asian American and Pacific Islander Heritage Month, 2010

By the President of the United States of America

A Proclamation

For centuries, America's story has been tied to the Pacific. Generations of brave men and women have crossed this vast ocean, seeking better lives and opportunities, and weaving their rich heritage into our cultural tapestry. During Asian American and Pacific Islander Heritage Month, we celebrate the immeasurable contributions these diverse peoples have made to our Nation.

Asian Americans and Pacific Islanders have shared common struggles throughout their histories in America—including efforts to overcome racial, social, and religious discrimination. This year marks the 100th anniversary of the Angel Island Immigration Station in San Francisco Bay, a milestone that reminds us of an unjust time in our history. For three decades, immigrants from across the Pacific arrived at Angel Island, where they were subject to harsh interrogations and exams, and confined in crowded, unsanitary barracks. Many who were not turned back by racially prejudiced immigration laws endured hardship, injustice, and deplorable conditions as miners, railroad builders, and farm workers.

Despite these obstacles, Asian Americans and Pacific Islanders have persevered and flourished, achieving success in every sector of American life. They stood shoulder to shoulder with their fellow citizens during the civil rights movement; they have served proudly in our Armed Forces; and they have prospered as leaders in business, academia, and public service.

This month, as we honor all Americans who trace their ancestry to Asia and the Pacific Islands, we must acknowledge the challenges they still face. Today, many Asian American and Pacific Islander families experience unemployment and poverty, as well as significant education and health disparities. They are at high risk for diabetes and hepatitis, and the number of diagnoses for HIV/AIDS has increased in recent years.

We must recognize and properly address these critical concerns so all Americans can reach their full potential. That is why my Administration reestablished both the White House Initiative and the President's Advisory Commission on Asian Americans and Pacific Islanders (AAPI). These partnerships include leaders from across our Government and the AAPI community, dedicated to improving the quality of life and opportunities for Asian Americans and Pacific Islanders.

Asian Americans and Pacific Islanders are a vast and diverse community, some native to the United States, hailing from Hawaii and our Pacific Island territories. Others trace their heritage to dozens of countries. All are treasured citizens who enrich our Nation in countless ways, and help fulfill the promise of the American dream which has drawn so many to our shores.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2010, as Asian American and Pacific Islander Heritage Month. I call upon all Americans

to learn more about the history of Asian Americans and Pacific Islanders, and to observe this month with appropriate programs and activities.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of April, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fourth.

[FR Doc. 2010–10728
Filed 5–4–10; 8:45 am]
Billing code 3195–W0–P

Presidential Documents

Proclamation 8509 of April 29, 2010

National Physical Fitness and Sports Month, 2010

By the President of the United States of America

A Proclamation

The 2010 Winter Olympics inspired people around the globe as they watched elite athletes push their bodies to the limit. Olympic competition showcases the vibrancy that physical activity can add to a person's life. Exercise strengthens both body and mind, and maintaining good health can help prevent injury and disease. Americans of every age, background, and ability can weave activity into their daily habits to improve their mental and physical wellbeing. This month, we celebrate fitness, sports, and outdoor recreation as both healthy activities and cherished national traditions.

Exercise can help prevent complications from conditions like heart disease, diabetes, and obesity, which are among our most costly and widespread health problems. That is why my Administration is investing in the long-term health of our Nation by encouraging Americans to stay fit. Through interactive toolkits and programs, the President's Council on Physical Fitness and Sports helps motivate citizens of all ages to incorporate physical activity into their lives. Visit Fitness.gov for more information and resources to get started.

Involvement in sports and recreational activities offer opportunities for young people to learn about teamwork, fair play, focus, and dedication. As they develop into athletes, they acquire time management, goal setting, and leadership skills. At any age, exercising with others also builds lasting friendships and helps keep individuals motivated and involved.

Our future depends on how we raise and prepare the next generation, and America's epidemic of childhood obesity requires our immediate attention. The Department of Health and Human Services, the President's Council on Physical Fitness and Sports, and other members of the White House Task Force on Childhood Obesity are partnering with First Lady Michelle Obama's "Let's Move" initiative to solve this epidemic within a generation. "Let's Move" cultivates the appreciation of nutritious food and inspires kids to engage in physical activity. It empowers parents and caregivers by emphasizing their role in making healthy choices for their children and stresses the importance of access to nutritious foods in our schools and communities. Visit LetsMove.gov to learn more about this exciting campaign.

During National Physical Fitness and Sports Month, let us recommit to making healthy choices that will reduce our risk of chronic diseases and help our families lead longer, happier lives.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2010 as National Physical Fitness and Sports Month. I call upon all Americans to take control of their health and wellness by making physical activity, fitness, and sports participation an important part of their daily lives.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of April, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fourth.

[FR Doc. 2010–10729
Filed 5–4–10; 8:45 am]
Billing code 3195–W0–P

Presidential Documents

Proclamation 8510 of April 29, 2010

National Charter Schools Week, 2010

By the President of the United States of America

A Proclamation

Our Nation's future depends on the education we provide to our sons and daughters, and charter schools across America serve as laboratories for education. Ideas developed and tested by charter schools have unlocked potential in students of every background and are driving reform throughout many school districts. During National Charter Schools Week, we recommit to supporting innovation in teaching and learning at high quality charter schools and ensuring all our students have a chance to realize the American Dream.

Principals, teachers, parents, school boards, and communities are working together to transform our public schools, and countless children stand to benefit from the replication of effective education models. In the 21st century, a world class education is our best avenue to prosperity. The skills and knowledge students gain in school—reinforced by the love of learning educators and mentors can foster—can empower young Americans to achieve their dreams and lead our country in the global marketplace.

The size and scope of the challenges before us require us to align our deepest values and commitments to the demands of a new age. My Administration is committed to helping schools prepare the next generation of leaders by reaching beyond standardized methods and promoting creative teaching strategies and learning techniques. By giving all our children access to a complete and competitive education, we will pass on the American spirit of limitless possibility to the next generation.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim May 2 through May 8, 2010, as National Charter Schools Week. I commend our Nation's charter schools, teachers, and administrators, and I call on States and communities to support charter schools and the students they serve.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of April, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fourth.

[FR Doc. 2010–10730
Filed 5–4–10; 8:45 am]
Billing code 3195–W0–P

Presidential Documents

Proclamation 8511 of April 29, 2010

Law Day, U.S.A., 2010

By the President of the United States of America

A Proclamation

For over two centuries, our Nation has adhered to the rule of law as the foundation for a safe, free, and just society. President Eisenhower, seeking to formally recognize this tradition, established Law Day in 1958 as "a day of national dedication to the principles of government under law." Each Law Day, we celebrate our commitment to the rule of law and to upholding the fundamental principles enshrined in our founding documents.

Today, we can travel, communicate, and conduct business around the world faster than ever before. The theme of this year's Law Day, "Law in the 21st Century: Enduring Traditions and Emerging Challenges," reminds us to draw upon and adapt our time-honored legal traditions to meet the demands of a global era. The prosperity we enjoy as a Nation of laws increasingly depends on preserving the rights and liberties not just in our own country but also in other nations.

In an increasingly interconnected world, legal issues of human rights, criminal justice, intellectual property, business transactions, dispute resolution, human migration, and environmental regulation affect us all. The enduring legal principles of due process and equal protection of the law, judicial independence, access to justice, and a firm commitment to the rule of law will continue to allow us to address today's concerns while anticipating tomorrow's challenges.

On this Law Day, I encourage all Americans to reflect upon and renew our commitment to our legal traditions. By fostering an open dialogue about law's role in the 21st century, we help ensure that all people understand, remain dedicated to, and are protected by the principles of government under law.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, in accordance with Public Law 87–20, as amended, do hereby proclaim May 1, 2010, as Law Day, U.S.A. I call upon all Americans to acknowledge the importance of our Nation's legal and judicial systems with appropriate ceremonies and activities, and to display the flag of the United States in support of this national observance.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of April, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fourth.

[FR Doc. 2010–10746
Filed 5–4–10; 8:45 am]
Billing code 3195–W0–P

Presidential Documents

Proclamation 8512 of April 29, 2010

Loyalty Day, 2010

By the President of the United States of America

A Proclamation

On July 4, 1776, after the adoption of the Declaration of Independence, the Continental Congress of the newly formed United States of America appointed a committee to design a national seal. Our Founders set out to create a visible symbol of our sovereign country to inspire all our citizens and to represent us abroad.

An initial sketch depicted a banner bearing the Latin motto, "E Pluribus Unum," or, "Out of many, one." After years of deliberation and multiple drafts of the emblem's design, the final seal displayed an eagle with outstretched wings, clenching a banner in its beak with those powerful words emblazoned across it. It became a cherished creed, representing the foundation of our national values. As a union of States and a Nation of immigrants from every part of the world, we are bound as one people by our adherence to common ideals: individual equality, constitutional liberty, and the rule of law.

Over two centuries since our Founders established our Republic and our freedom, the firm resolve that ran in their veins still courses through our own. Since then, countless loyal Americans have risen to preserve our Union and the blessings bestowed upon us. Today, whether singing the national anthem, watching our flag billow in the breeze, or seeing the hope in a young child's eyes, each of us can still feel the patriotism and respect for one another that defines us as a people. It is the same love of country that drives our Armed Forces to shoulder the responsibility of defending our citizens and our values. We will forever stand united against any force that seeks to divide us, finding strength in our diversity and inspiration in the sacrifices of our forebears.

The Congress, by Public Law 85–529 as amended, has designated May 1 of each year as "Loyalty Day." On this day, we honor the legacy of these United States, and we remember all those who have fought to defend our freedom.

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim May 1, 2010, as Loyalty Day. This Loyalty Day, I call upon the people of the United States to join in this national observance, to display the flag of the United States, and to pledge true and steadfast allegiance to the Republic for which it stands.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of April, in the year of our Lord two thousand ten, and of the Independence of the United States of America the two hundred and thirty-fourth.

[FR Doc. 2010–10748
Filed 5–4–10; 8:45 am]
Billing code 3195–W0–P

Rules and Regulations

Federal Register
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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1205

[Doc. # AMS–CN–10–0027; CN–08–003]

RIN 0581–AC84

Cotton Research and Promotion Program: Designation of Cotton-Producing States

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: The Agricultural Marketing Service (AMS) is amending the Cotton Research and Promotion Order (Cotton Order) following a referendum held October 13 through November 10, 2009, in which Upland cotton producers and importers favored the adoption of two amendments to the Cotton Order. The amendments were proposed by AMS to amend the Cotton Order and implement section 14202 of the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) that amended the Cotton Research and Promotion Act (Cotton Act). The 2008 Farm Bill provided that Kansas, Virginia, and Florida be separate states in the definition of "cotton-producing state" effective beginning with the 2008 crop of cotton. In addition, AMS proposed to amend the definition of "cotton-producing region" for consistency with the changes to the definition of cotton-producing state.

DATES: *Effective Date:* This rule is effective May 6, 2010.

FOR FURTHER INFORMATION CONTACT: Shethir M. Riva, Chief, Research and Promotion Staff, Cotton and Tobacco Programs telephone (202) 720–6603, facsimile (202) 690–1718, or e-mail at *Shethir.Riva@ams.usda.gov.*

SUPPLEMENTARY INFORMATION: Prior documents in this proceeding: Notice of Hearing issued on November 24, 2008, and published in the December 1, 2008, issue of the **Federal Register** (73 FR 72747); and the Secretary's Decision and Referendum Order on Proposed Amendments to the Cotton Research and Promotion Order (Order) issued on September 28, 2009, and published in the October 5, 2009, issue of the **Federal Register** (74 FR 51094).

This administrative action is governed by the provisions of sections 556 and 557 of title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Order 12866.

Preliminary Statement

This final rule was formulated based on the record of the public hearing held in Washington, DC, on December 5, 2008. Notice of this hearing was issued on November 24, 2008, and published in the December 1, 2008, issue of the **Federal Register** (73 FR 72747). The hearing was held to consider and receive evidence from Upland cotton producers, importers, and other interested parties on the proposed amendments to the Cotton Order (7 CFR part 1205). The hearing was held pursuant to the provisions of the Cotton Research and Promotion Act (Cotton Act) (7 U.S.C. 2101–2118), and the applicable rules of practice and procedure governing research and promotion programs (7 CFR part 1200). The notice of hearing contained Cotton Order changes proposed by the Agricultural Marketing Service (AMS).

AMS concluded that conditions existed that warranted the omission of a recommended decision in this rulemaking proceeding under 7 CFR 1200.13(d) of the Rules of Practice and Procedure with respect to the proposed amendments.

Upon the basis of the evidence introduced at the hearing and the record, a Secretary's Decision and Referendum Order was issued on September 28, 2009, directing that a referendum be conducted during the period October 13 through November 10, 2009, among Upland cotton producers and importers to determine whether they favored the proposed amendments to the Cotton Order. For the amendments to be approved, section 10(b)(2) of the Cotton Act provides that the amendments must be approved by a majority of cotton producers and importers subject to the Cotton Order voting in the referendum. Of the 445 valid ballots cast, 405 or 91 percent favored the amendments to the Order. Opposing ballots totaled 40 or 9 percent.

The amendments favored by vote and included in this final rule will:

(1) Amend the Cotton Order to incorporate the States of Kansas, Virginia, and Florida into the definition of "cotton-producing state" as separate states.

(2) Amend the definition of "cotton-producing region" to list Kansas, Virginia, and Florida as separate states.

Regulatory Flexibility Act and Paperwork Reduction Act

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) [5 U.S.C. 601–612], AMS has considered the economic effect of this action on small entities and has determined that its implementation will not have a significant economic impact on a substantial number of small entities. There are currently approximately 18,000 producers, and approximately 16,000 importers that are subject to the Cotton Order. In 13 CFR part 121, the Small Business Administration (SBA) defines small agricultural producers as those having annual receipts of no more than $750,000 and small agricultural service firms (importers) as those having annual receipts of no more than $7.0 million. The majority of these producers and importers are small businesses under the criteria established by the SBA.

The Cotton Act provides authority to establish the Cotton Board to administer the Cotton Research and Promotion Program. The Board is currently composed of 39 members and 39 alternate members (23 producer and 16 importer members and alternate members) and one consumer advisor. The Board is responsible for carrying out an effective and continuous program of research and promotion in order to strengthen the competitive position of Upland cotton by expanding domestic and foreign markets for cotton, improving fiber quality, and lowering the costs of production. The Program, including U.S. Department of Agriculture administrative costs, is financed through producer and importer assessments levied on each bale or bale equivalent of cotton at a rate of $1 per bale with a supplemental (currently 5/10ths of one percent) assessment not to exceed one percent of the value of lint of each bale. There are approximately

18,000 producers, and approximately 16,000 importers that are subject to the Order. In 2008 budget year, the Board collected $64.2 million in assessments ($36.2 million from producers and $28 million from importers).

Interested persons were invited to present evidence at the hearing on the possible regulatory and informational impacts of the proposals on small businesses. The amendments proposed herein would not result in any additional regulatory requirements being imposed on cotton producers and importers. The proposed amendments to the Cotton Order merely reflect the statutory changes needed to implement the 2008 Farm Bill provisions that provided that Kansas, Virginia, and Florida be separate states in the definition of "cotton-producing state."

There are no new information collection reports as a result of the proposed amendments. Information collection requirements and recordkeeping provisions contained in 7 CFR part 1205 have been previously approved by the Office of Management and Budget (OMB) and assigned OMB Control Number 0581–0093 under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Civil Justice Reform

The amendments herein have been reviewed under Executive Order 12988, Civil Justice Reform. They are not intended to have retroactive effect.

The Cotton Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 12 of the Cotton Act, any person subject to an order may file with the Secretary of Agriculture a petition stating that the order, any provision of the plan, or any obligation imposed in connection with the order is not in accordance with law and requesting a modification of the order or to be exempted therefrom. Such person is afforded the opportunity for a hearing on the petition. After the hearing, the Secretary would rule on the petition. The Cotton Act provides that the District Court of the United States in any district in which the person is an inhabitant, or has his principal place of business, has jurisdiction to review the Secretary's ruling, provided a complaint is filed within 20 days from the date of the entry of ruling.

Order Amending the Order Regulating the Cotton Research and Promotion Program

Findings and Determinations

The findings and determinations hereinafter set forth are supplementary and in addition to the findings and determinations previously made in connection with the issuance of the Order; and all of said previous findings and determinations are hereby ratified and affirmed.

(a) Findings and determinations upon the basis of the hearing record.

Pursuant to the provisions of the Cotton Research and Promotion Act (Cotton Act) (7 U.S.C. 2101–2118), and the applicable rules of practice and procedure effective thereunder (7 CFR part 1200), a public hearing was held in Washington, D.C. on December 5, 2008, on the proposed amendments to the Cotton Research and Promotion Order (7 CFR part 1205). Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The Cotton Order, as amended, as hereby proposed to be further amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) All cotton produced and handled in the United States is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects interstate or foreign commerce in cotton and cotton products.

(b) Additional findings.

It is necessary and in the public interest to make these amendments to the order effective not later than one day after publication in the **Federal Register.** It is necessary and in the public interest to make these amendments to the order effective not later than one day after publication in the **Federal Register** to allow for organizations in the states of Florida, Kansas, and Virginia to become certified to nominate producers to the Board and to participate in the upcoming nomination caucuses in 2010.

In view of the foregoing, it is hereby found and determined that good cause exists for making these amendments effective one day after publication in the **Federal Register,** and that it would be contrary to the public interest to delay the effective date for 30 days after publication in the **Federal Register** (Administrative Procedure Act; 5 U.S.C. 551–559).

(c) *Determinations.*

(1) Upland cotton producers and importers who during the period of January 1 through December 31, 2008 (which has been deemed to be the representative period), either produced or imported cotton, as hereby amended the Cotton Order; and

(2) The issuance of this amendatory order is favored or approved by a majority of cotton producers and importers subject to the Cotton Order voting in the referendum.

The provisions of the amended Order are set forth in full herein contained in the Secretary's Decision issued by the AMS Administrator on September 28, 2009, and published in the **Federal Register** on October 5, 2009, shall be and are the terms and provisions of this order amending the Cotton Order.

List of Subjects in 7 CFR Part 1205

Advertising, Agricultural research, Cotton, Marketing agreements, Reporting and recordkeeping requirements.

■ Accordingly, as stated in the preamble, AMS amends 7 CFR part 1205 as follows:

PART 1205—COTTON RESEARCH AND PROMOTION

■ 1. The authority citation 7 CFR part 1205 continues to read as follows:

Authority: 7 U.S.C. 2101–2118 and 7 U.S.C. 7401.

■ 2. Revise § 1205.314 to read as follows:

§ 1205.314 Cotton-producing State.

Cotton-producing State means each of the following States and combination of States: Alabama; Arizona; Arkansas; California-Nevada; Florida; Georgia; Kansas; Louisiana; Mississippi; Missouri-Illinois; New Mexico; North Carolina; Oklahoma; South Carolina; Tennessee-Kentucky; Texas; Virginia.

■ 3. Revise § 1205.319 to read as follows:

§ 1205.319 Cotton-producing region.

Cotton-producing region means each of the following groups of cotton-producing States:

(a) Southeast Region: Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia;

(b) Midsouth Region: Arkansas, Louisiana, Mississippi, Missouri-Illinois, and Tennessee-Kentucky;

(c) Southwest Region: Kansas, Oklahoma and Texas;

(d) Western Region: Arizona, California-Nevada, and New Mexico.

Dated: April 29, 2010.

David R. Shipman,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2010–10558 Filed 5–4–10; 8:45 am]

BILLING CODE 3410–02–P

FEDERAL ELECTION COMMISSION

11 CFR Part 300

[Notice 2010–11]

Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: The Federal Election Commission ("Commission") is revising its rules regarding appearances by Federal officeholders and candidates at State, district, and local party fundraising events under the Federal Election Campaign Act of 1971, as amended. Consistent with the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays* v. *FEC,* Federal candidates and officeholders may no longer speak at State, district, and local party fundraising events "without restriction or regulation." The revised rules address participation by Federal candidates and officeholders at all non-Federal fundraising events that are in connection with an election for Federal office or any non-Federal election and in related publicity.

DATES: *Effective Date:* These rules are effective on June 4, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, or Attorneys, Mr. David C. Adkins or Mr. Neven F. Stipanovic, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002 [1] ("BCRA") contained extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* ("the Act"). The Commission promulgated a number of rules to implement BCRA, including rules at 11 CFR 300.64 regarding Federal candidate and officeholder solicitations at State, district, and local party committee fundraising events. The Court of Appeals for the District of Columbia Circuit found aspects of these rules invalid in *Shays* v. *FEC,* 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"). The Commission is revising its rules at 11 CFR 300.64 to implement the *Shays III* decision.

I. Background Information

A. BCRA

In 2002, Congress amended the Act by restricting the fundraising activity of Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained, controlled by, or acting on behalf of, Federal candidates or officeholders. *See* BCRA at Section 323(e) (codified at 2 U.S.C. 441i(e)). These persons may not "solicit, receive, direct, transfer or spend" funds in connection with an election for Federal office or any non-Federal election unless the funds comply with the amount limitations and source prohibitions of the Act.[2] *See* 2 U.S.C. 441i(e)(1)(A) and (e)(1)(B); 11 CFR 300.61 and 300.62. Furthermore, Congress prohibited State, district and local party committees from accepting or using as Levin funds [3] any funds that have been solicited, received, directed, transferred, or spent by or in the name of Federal candidates and officeholders. Thus, Federal candidates and officeholders were effectively prohibited from raising Levin funds. *See* 2 U.S.C. 441i(b)(2)(C)(i); 11 CFR 300.31(e).

As one principal BCRA sponsor noted, "The basic rule in the bill is that federal candidates and officials cannot raise non-federal (or soft) money donations—that is, funds that do not comply with federal contribution limits and source prohibitions." 148 Cong. Rec. H407 (daily ed. Feb. 13, 2002) (statement of Rep. Shays). As that ban related to party committees, another of BCRA's main sponsors noted: "The rule here is simple: Federal candidates and officeholders cannot solicit soft money funds, funds that do not comply with Federal contribution limits and source prohibitions, for any party committee—national, State, or local." 148 Cong. Rec. S2139 (daily ed. March 20, 2002) (statement of Sen. McCain).

Notwithstanding these restrictions, though, Section 323(e)(3) of BCRA states explicitly that Federal candidates and officeholders are permitted to "attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party." *See* 2 U.S.C. 441i(e)(3).

B. 2002 Rulemaking

In 2002, the Commission commenced a rulemaking to establish rules governing Federal candidate and officeholder participation in State, district, and local party committee fundraising events. The Commission proposed alternative interpretations of 2 U.S.C. 441i(e)(3). One interpretation would have allowed Federal candidates and officeholders only to attend, speak, or be a featured guest at State, district, and local party committee fundraising events, but, consistent with the Act's prohibition on the solicitation of funds outside the amount limitations and source prohibitions of the Act by Federal candidates and officeholders, would have prohibited those persons from soliciting, receiving, directing, transferring, or spending funds or participating in any other fundraising aspect of a State, district, or local party committee fundraising event. *See* Notice of Proposed Rulemaking on Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 FR 35654, 35672, 35688 (May 20, 2002) ("2002 NPRM").

An alternative interpretation proposed a "total exemption from the general solicitation ban." 2002 NPRM at 35672–73; *see also* 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. Under this interpretation, Federal candidates and officeholders would be permitted to "speak freely at [party fundraising events] without restriction or regulation." 2002 NPRM at 35672–73. The Commission separately explored how 2 U.S.C. 441i(e)(3)—specifically, its reference to "featured guests"—affected the role that Federal candidates and officeholders could play in publicizing State, district, and local party committee events. *See* 2002 NPRM at 35673. For example, the Commission sought comment on whether this provision of BCRA allowed Federal candidates and officeholders to be named in invitation materials and to appear as members of a host committee. *Id.*

The Commission concluded that Section 441i(e)(3) was a total exemption from the general solicitation ban. Under the Commission's regulation, Federal candidates and officeholders were permitted to attend, speak, and appear

[1] Public Law 107–155, 116 Stat. 81 (2002).

[2] The amount limitations on contributions depend on the type of contributor and the recipient. *See* 2 U.S.C. 441a(a)(1), (2), and (3). For example, an individual and a non-multicandidate PAC may each contribute up to $2,400 per election to a candidate, up to $5,000 per calendar year to a PAC, and up to $10,000 per year to a State party committee (or to a State party's respective district and local party committees, which share the State party committee's combined limit). A multicandidate PAC, by contrast, may contribute up to $5,000 per election to a candidate, up to $5,000 per calendar year to a PAC, and up to $5,000 per calendar year to a State party committee (or to a State party's respective district and local party committees, which share the State party committee's combined limit). Sources prohibited from making contributions under the Act include national banks, corporations, labor organizations, and foreign nationals. *See* 2 U.S.C. 441a, 441b, and 441e; *see also* 2 U.S.C. 441c (government contractors) and 441f (contributions made in the name of another). Furthermore, funds raised in connection with an election for Federal office are subject to the reporting requirements of the Act. *See* 2 U.S.C. 441i(e)(1)(A).

[3] "Levin funds" are funds raised by State, district, or local party committees pursuant to the restrictions in 11 CFR 300.31 and disbursed subject to the restrictions in 11 CFR 300.32. *See* 11 CFR 300.2(i).

as featured guests at State, district, and local party committee fundraising events "without restriction or regulation." *See* Final Rules on Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 FR 49064, 49108 (July 29, 2002) ("2002 Final Rule"); 11 CFR 300.64(b). The Commission did not, however, interpret 2 U.S.C. 441i(e)(3) to allow unrestricted participation in publicity by Federal candidates and officeholders. Indeed, the Commission concluded that Federal candidates and officeholders were "prohibited from serving on 'host committees' for a party fundraising event or from personally signing a solicitation in connection with a State, local, or district party fundraising event on the basis that these pre-event activities are outside the permissible activities* * * flowing from a Federal candidate's or officeholder's appearance or attendance at the event." *See* 2002 Final Rule at 49108.

C. Shays I

The Commission's 2002 regulation implementing 2 U.S.C. 441i(e)(3) was challenged in *Shays* v. *FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004) ("*Shays I*"). The district court held that the meaning of 2 U.S.C. 441i(e)(3) was ambiguous, and that the Commission's regulation was not necessarily contrary to congressional intent. *Shays I* at 90 (applying *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984)). And, while the court acknowledged that the regulation created "the potential for abuse," it did not find that the regulation unduly compromised BCRA's purpose such that it was not entitled to deference from the court. *Id.* at 91. The court did, however, find that the Commission's explanation of the rule was inadequate and, therefore, in violation of the Administrative Procedure Act, 5 U.S.C. 553. *Shays I* at 92–93. The Commission did not challenge this holding by the district court.

D. 2005 Rulemaking

Upon remand, the Commission commenced a rulemaking to implement the *Shays I* district court's opinion. *See* Revised Explanation and Justification, Candidate Solicitation at State, District and Local Party Fundraising Events, 70 FR 37649 (June 30, 2005) ("2005 Revised E&J"). This rulemaking provided additional explanation and justification of the 2002 Final Rule, but it did not change the text of that rule. The Commission, as it did in 2002, concluded that 2 U.S.C. 441i(e)(3) was a total exemption from the general solicitation ban. Thus, Federal candidates and officeholders could still attend, speak, and appear as featured guests at State, district, and local party committee fundraising events "without restriction or regulation." *See* 2005 Revised E&J at 37650–51.

E. Shays III

Against this backdrop, the Commission's rule implementing 2 U.S.C. 441i(e)(3) was again challenged in court. The District Court for the District of Columbia upheld the Commission's regulation. *Shays* v. *FEC,* 508 F. Supp. 2d. 10 (D.D.C. 2007).

On appeal, however, the United States Court of Appeals for the District of Columbia Circuit reversed the district court, concluding that the total exemption from the general solicitation ban "allows what BCRA directly prohibits." *Shays III* at 933. In addressing the Commission's regulation, the Court first concluded that 2 U.S.C. 441i(e)(3) did not create an ambiguity in the law, but should be read as "merely clarif[ying] that * * * federal candidates may still 'attend, speak, or be a featured guest' at State party events where soft money is being raised, which the statute might otherwise be read as forbidding." *Id.* The court then held that the Commission had "no basis" to read 2 U.S.C. 441i(e)(3) as creating "an implied fourth exception" to the solicitation restrictions at Section 441i(e)(1), given that Congress had explicitly enumerated the instances in which Federal candidates and officeholders could "solicit" funds outside BCRA's restrictions. *Id.* at 933–34. The court found compelling the specific language in the statute—noting that "Congress repeatedly used the term 'solicit' and 'solicitation' in Section 441i—over a dozen times—yet chose not to do so in Section 441i(e)(3)."

F. Advisory Opinions

The Commission has also issued several advisory opinions regarding aspects of participation by Federal candidates and officeholders in non-Federal fundraising events not specifically addressed by the Act and regulations. In particular, the Commission has provided guidance on the extent to which Federal candidates and officeholders may participate in non-Federal fundraising events for entities other than State, district, and local party committees and the degree to which that participation can be publicized before such an event.

In Advisory Opinions 2003–02 (Cantor) and 2003–36 (Republican Governors Association), the Commission stated that a Federal candidate or officeholder may attend and speak at non-Federal fundraising events for State and local candidates and other non-Federal political organizations, even if non-Federal funds are being raised at the event. The Commission concluded that this type of participation would not violate BCRA's restrictions on soliciting funds outside the limits and prohibitions of the Act because attending such an event or giving a speech at such an event is not a solicitation under Commission regulations.

In those same advisory opinions, the Commission also determined that Federal candidates and officeholders may solicit funds at events at which non-Federal funds are being raised if their solicitations are limited to funds that comply with the amount limitations and source prohibitions of the Act. To ensure that these solicitations are properly limited, Federal candidates and officeholders have had to either (1) make a specific solicitation such as "I am soliciting $500 from individuals only," or (2) condition a general solicitation with a disclaimer indicating that the solicitation is only for funds within the limitations and prohibitions of the Act. This disclaimer may be made orally by the Federal candidate or officeholder or, alternatively, in writing by posting at the event a clear and conspicuous notice limiting the solicitation.

The Commission also issued several advisory opinions addressing the role that Federal candidates and officeholders may play in publicizing non-Federal fundraising events for State, district, and local party committees and other non-Federal entities. *See* Advisory Opinions 2003–03 (Cantor), 2003–36 (Republican Governors Association), and 2007–11 (California State Party Committees). The Commission reasoned that if publicity does not contain a solicitation, then it is not subject to BCRA's solicitation restrictions. *Id.* If the publicity does contain a solicitation, and the Federal candidate or officeholder consents to be featured or appear in the publicity, then the publicity must contain a clear and conspicuous disclaimer limiting the solicitation to funds compliant with the amount limitations and source prohibitions of the Act. *See* Advisory Opinions 2003–03 (Cantor), and 2003–36 (Republican Governors Association). The Commission made clear, however, that Federal candidates and officeholders may not solicit funds in excess of the limitations and prohibitions of the Act and then qualify that impermissible solicitation with a limiting disclaimer. *See* Advisory

Opinion 2003–36 (Republican Governors Association).

The Commission was unable to resolve whether a Federal candidate or officeholder could be named as honorary chairperson or featured speaker in a solicitation for non-Federal funds that is not otherwise signed by the Federal candidate or officeholder. *See* Advisory Opinions 2003–36 (Republican Governors Association) and 2007–11 (California State Party Committees). In addition, the Commission was unable to resolve whether a Federal candidate or officeholder may be named as a featured speaker on publicity that is mailed with (*e.g.,* in the same envelope as) a solicitation for non-Federal funds that does not name a Federal candidate or officeholder. *See* Advisory Opinion 2007–11 (California State Party Committees).

G. Present Rulemaking

In response to the circuit court's decision in *Shays III,* the Commission published a Notice of Proposed Rulemaking on December 7, 2009. *See* Notice of Proposed Rulemaking on Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 74 FR 64016 (Dec. 7, 2009) ("NPRM"). The NPRM proposed three alternative revisions to the Commission's rule at 11 CFR 300.64. The first alternative proposed a surgical revision to the rule, striking the "without restriction or regulation" language but leaving the other language unchanged. The other two alternatives effected the same change but also proposed new rules governing Federal candidate and officeholder participation in all non-Federal fundraising events—those for State, district, and local party committees as well as other entities, including State and local candidates and State political committees and organizations—and related publicity.

The initial public comment period for the NPRM closed on February 8, 2010, and a reply comment period concluded on February 22, 2010. In total, the Commission received seven comments (six initial comments and one reply comment) from seven commenters. The Commission held a public hearing on the proposed rules on March 16, 2010, at which four witnesses testified. All comments and a public transcript of the hearing are available at *http://www.fec.gov/law/law_rulemakings.shtml#solicitationshays3*. For purposes of this document, the terms "comment" and "commenter" apply to both written comments and oral testimony at the public hearing.

These final rules address participation by Federal candidates and officeholders at all fundraising events in connection with an election for Federal office or any non-Federal election—both those for State, district, and local party committees and those for other entities—at which funds outside the amount limitations and source prohibitions of the Act, or Levin funds, are solicited, even if funds that comply with the amount limitations and source prohibitions are also solicited at the event. The final rules cover participation by Federal candidates and officeholders at the event as well as participation by Federal candidates and officeholders in publicizing the event. Importantly, they set forth the manner in which Federal candidates, officeholders, and their agents can be involved in such activities without making a solicitation of funds outside the amount limitations and source prohibitions of the Act.

Under the APA, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules that follow were transmitted to Congress on April 30, 2010.

II. Explanation and Justification

The Commission is amending 11 CFR 300.64 in response to the circuit court's decision in *Shays III.* In the NPRM, the Commission proposed three alternative rules. Alternative 1 would have removed the "without restriction or regulation" language from 11 CFR 300.64 pursuant to the decision of the *Shays III* court, and would have left the rest of the rule largely intact. Under Alternative 1, 11 CFR 300.64 would have continued to address only fundraising events for State, district, and local party committees.

Alternatives 2 and 3 proposed more extensive revisions of 11 CFR 300.64. Like Alternative 1, and in response to the court of appeals' decision, both Alternatives 2 and 3 would have removed the "without restriction or regulation" language from 11 CFR 300.64. Unlike Alternative 1, Alternatives 2 and 3 also proposed addressing more broadly participation by Federal candidates and officeholders at all fundraising events at which funds outside the limits and prohibitions of the Act are raised ("non-Federal fundraising events"), and not just party committee events. Alternatives 2 and 3 proposed detailed guidance on Federal candidate and officeholder participation at non-Federal fundraising events. In addition, the alternatives proposed guidance on the manner in which Federal candidates and officeholders could participate in publicizing such events. While Alternatives 2 and 3 addressed the same range of activities, their treatment of those activities differed. Alternative 2 proposed a single set of rules for all non-Federal fundraising events and related publicity; it did not distinguish State, district, and local party events from other non-Federal fundraising events. Alternative 3, though, proposed two different standards: One for State, district, and local party committee fundraising events and another for non-party fundraising events.

The contrasting approaches in Alternatives 2 and 3 were rooted in differing interpretations of 2 U.S.C. 441i(e)(3), particularly in the wake of the *Shays III* decision. Alternative 2 was predicated on the statement in the *Shays III* decision that 2 U.S.C. 441i(e)(3) "merely clarifies" that Federal candidates may attend, speak, and appear as featured guests at State, district, and local party committee events without such activities constituting an unlawful "solicitation." *Shays III* at 933. As a "mere[ ] clarif[ication]," 2 U.S.C. 441i(e)(3) neither affords special permissions with regard to Federal candidate and officeholder participation in State, district, and local party committee fundraising events, nor does it imply any restrictions with regard to other non-Federal fundraising events. Accordingly, Alternative 2 did not distinguish between State, district, and local party events and other non-Federal fundraising events.

Alternative 3 was instead informed by an interpretation of 2 U.S.C. 441i(e)(3) as establishing a limited statutory exception for Federal candidates to attend, speak and be featured guests at State, district, and local party committee fundraisers—activities that the court in *Shays III* acknowledged "might otherwise be read as forbid[den]" by the Act's fundraising restrictions—which did not extend to non-party fundraisers because they were not addressed by the statutory provision. *Shays III* at 933. Accordingly, Alternative 3 proposed one standard for Federal candidate and officeholder participation at State, district, and local party committee events and another—more restrictive—standard for Federal candidate and officeholder participation at other non-Federal fundraising events.

The Commission sought comments on the three alternatives, specifically

asking whether each would faithfully implement the statute, whether each was responsive to the *Shays III* decision, and whether each would provide sufficient guidance to Federal candidates and officeholders; State, district, and local party committees; and other affected entities.

Regarding Alternative 1, commenters acknowledged that it was technically responsive to the *Shays III* opinion, but that it would leave unanswered many important questions regarding Federal candidate and officeholder participation in non-Federal fundraising events. In particular, the commenters pointed out that Alternative 1 would not address the Commission's previous guidance regarding Federal candidate and officeholder participation in publicity for non-Federal fundraising events and whether—or how—a Federal candidate or officeholder could solicit funds at a State, district, or local party committee non-Federal fundraising event.[4] One commenter suggested that failure to address these related areas would create "uncertainty and trepidation for State and local parties" that would chill involvement between them and Federal candidates and officeholders and ultimately limit the parties' ability "to communicate their message and to fully participate in the political process." No commenters objected to the Commission's proposal to establish rules addressing more broadly Federal candidate and officeholder participation at all non-Federal fundraising events.

A number of commenters supported the approach of Alternative 2, which applied the same framework to non-Federal fundraising events for State, district, and local party committees and to other non-Federal fundraising events. These commenters stated that Alternative 2 properly balanced the concerns of the *Shays III* court with the congressional intent behind BCRA, and that it better implemented the court's interpretation of 441i(e)(3). None of the commenters objected to this alternative.

With regard to Alternative 3, commenters generally did not favor its distinction between party committee events and other non-Federal fundraising events. Those commenters suggested that Alternative 3's approach went further than is required by the court's holding in *Shays III,* and that it would reverse previous Commission guidance that had come to be relied on by Federal candidates, officeholders, and party committees alike. One commenter predicted that Alternative 3 would effectively end participation by Federal candidates and officeholders at non-Federal fundraising events. The commenters that did not object to Alternative 3 nevertheless noted that the Act did not require "a distinction between different types of nonfederal fundraising events," as proposed in Alternative 3.

The Commission agrees that Alternative 1, while responsive to the *Shays III* decision, would leave unanswered many important questions regarding Federal candidate and officeholder participation in non-Federal fundraising events. Although the *Shays III* decision does not mandate the adoption of a single rule that addresses participation by Federal candidates and officeholders at all non-Federal fundraising events, Federal candidates and officeholders, as well as entities that solicit non-Federal funds in connection with elections, would benefit from the explicit guidance of a more comprehensive rule.

Accordingly, the Commission is revising 11 CFR 300.64 to provide guidance on participation by Federal candidates and officeholders in all non-Federal fundraising events in connection with an election for Federal office or any non-Federal election. As set forth in more detail below, the Commission's final rule explicitly addresses participation by Federal candidates and officeholders at such fundraising events, as well as participation by Federal candidates, officeholders, and their agents in publicizing these events. In addition, the rule covers participation by Federal candidates and officeholders regardless of whether the entity sponsoring the event is a State or local candidate committee, State political committee, or any other organization that hosts a fundraising event in connection with an election for Federal office or any non-Federal election.

The Commission's final rule is based on Alternative 2 in the NPRM. The Commission has determined that Alternative 2 best accomplishes two important goals: (1) Implementing 2 U.S.C. 441i(e) in accordance with the *Shays III* decision, and (2) providing clear, comprehensive guidance regarding Federal candidate and officeholder participation in non-Federal fundraising events and related publicity.

A. 300.64(a)—Scope

The scope of new 11 CFR 300.64 is set out in paragraph (a). The rule applies to all fundraising events in connection with an election for Federal office or any non-Federal election at which funds outside the limitations and source prohibitions of the Act, or Levin funds, are solicited. The rule applies even if funds within the amount limitations and source prohibitions of the Act are also solicited at an event or in publicity. The rule does not cover events at which funds outside the amount limitations and source prohibitions of the Act or Levin funds are not solicited but are, nevertheless, received. Nor does the rule cover fundraising events at which only Federal funds are solicited or fundraising events in connection with any non-Federal election at which only funds subject to the limitations and prohibitions of the Act are solicited, such as an event soliciting small-dollar, non-corporate, non-union funds for a State candidate.

The rule covers only non-Federal fundraising events that are "in connection with an election for Federal office or any non-Federal election." It does not apply to Federal candidate and officeholder participation in fundraising events that are not in connection with an election, consistent with the Act's prohibition on Federal candidates and officeholders from soliciting, receiving, directing, transferring, spending, or disbursing funds in connection with an election for Federal office or any non-Federal elections. *See* 2 U.S.C. 441i(e)(1)(B).

The scope of the final rule is very similar to the scope proposed in the NPRM, except that the proposed rule would have covered non-Federal fundraising events at which funds outside the limitations and prohibitions of the Act are raised, and the final rule covers non-Federal fundraising events at which funds outside the limitations and prohibitions of the Act are solicited. The Commission made this change in response to a comment that a solicitation-based standard more accurately captured the intent behind 2 U.S.C. 441i(e), which governs solicitations by Federal candidates and officeholders. The commenter expressed concern that a standard based on whether non-Federal funds are raised at an event could be triggered when, for example, a donor spontaneously donates a large, corporate check at a non-Federal fundraising event, even though no one, including the participating Federal candidate or

[4] While the latter issue was addressed by the Commission in advisory opinions with respect to non-Federal fundraising events for State candidates and 527 political organizations, *see* Advisory Opinions 2003–03 (Cantor) and 2003–36 (Republican Governors Association), the advisory opinions did not address Federal candidate and officeholder solicitation at State, district, or local party committee non-Federal fundraising events because 11 CFR 300.64 permitted Federal candidates and officeholders to solicit funds at such events "without restriction or regulation." The invalidation of this aspect of 11 CFR 300.64 in *Shays III* raised the question for the first time.

officeholder, had solicited funds outside the amount limitations or source prohibitions of the Act. The Commission agrees that a solicitation-based standard is more consistent with the Act's prohibition on solicitation than a standard based on whether funds are raised at an event. See 2 U.S.C. 441i(e)(1).

Commenters generally supported the proposed scope of the Commission's rule in the NPRM. They differed, however, on whether the rule's applicability should be limited to fundraising events that are "in connection with an election for Federal office or any non-Federal election." One commenter supported the proposal to limit the scope of the rule in this manner, while noting the Commission's articulation of the standard in previous advisory opinions, such as Advisory Opinions 2003–12 (Flake) and 2005–10 (Berman/Doolittle). One commenter urged the Commission to supersede Advisory Opinion 2005–10 (Berman/Doolittle), which, in the commenter's view, had incorrectly applied the "in connection with an election for Federal office or any non-Federal election" standard. Another commenter explicitly urged the Commission not to supersede the same.

The Commission declines to supersede Advisory Opinion 2005–10 (Berman/Doolittle) in this rulemaking and continues to be guided by its prior advisory opinions on the "in connection with an election for Federal office or any non-Federal election" standard. *See, e.g.,* Advisory Opinions 2005–10 (Berman/Doolittle) (solicitation of donations by Federal officeholders to a State ballot measure committee was not in connection with any election under the circumstances described in the request); 2004–14 (Davis) (solicitation of donations by a Federal officeholder to a charity was not in connection with any election); 2003–20 (Hispanic College Fund) (solicitation of donations by a Federal officeholder to a scholarship fund was not in connection with any election); and 2003–12 (Flake) (solicitation of donations by Federal officeholders for a political organization supporting a State referendum was in connection with an election under the circumstances described in the request). Further guidance from the Commission on which activities are in connection with an election for Federal office or any non-Federal election, and which are not, is best offered through the advisory opinion process.

The rule does not alter the fundraising exception for Federal candidates and officeholders who are also State candidates, found at 11 CFR 300.63, or the fundraising exceptions for certain tax-exempt organizations, found at 11 CFR 300.65. *See also* 2 U.S.C. 441i(e)(2) and (e)(4). Thus, in the event of any inconsistencies with new 11 CFR 300.64, the provisions of 11 CFR 300.63 and 300.65 govern.

B. 300.64(b)—Participation at Non-Federal Fundraising Events

Paragraph (b) of new 11 CFR 300.64 addresses participation by Federal candidates and officeholders at non-Federal fundraising events. Paragraph (b)(1) addresses attendance, speeches, and appearances as featured guests by Federal candidates and officeholders at non-Federal fundraising events. Paragraph (b)(2) addresses solicitations made by Federal candidates and officeholders at non-Federal fundraising events.

1. 300.64(b)(1)—Attending, Speaking or Being a Featured Guest at Non-Federal Fundraising Events

New 11 CFR 300.64(b)(1) provides that Federal candidates and officeholders may attend, speak at, and be featured guests at non-Federal fundraising events. This provision is consistent with the *Shays III* decision, which stated that 2 U.S.C. 441i(e)(3) "merely clarifies that despite the statute's ban on soliciting soft money, federal candidates may still 'attend, speak or be a featured guest' at state party events where soft money is raised, which the statute might otherwise be read as forbidding." *Shays III* at 933. If 2 U.S.C. 441i(e)(3) is a "mere[ ] clarifi[cation]," it follows that the same underlying framework applies to all fundraising events. Thus, if the statutory ban on soliciting soft money does not prohibit a Federal candidate or officeholder from attending, speaking at, or being a featured guest at a State, district, or local party committee's non-Federal fundraising event, then the statutory ban also does not prohibit the same person from engaging in the same activities at any other non-Federal fundraising event.

This portion of the final rule is identical to that proposed in Alternative 2 of the NPRM. No comments were received on this provision, although the commenters generally supported the Commission's broader proposal to treat Federal candidates' and officeholders' participation in all non-Federal fundraising events the same.

2. 300.64(b)(2)—Solicitations at Non-Federal Fundraising Events

Under new 11 CFR 300.64(b)(2), Federal candidates and officeholders may solicit funds at non-Federal fundraising events, provided that the solicitation is limited to funds that comply with the limitations and prohibitions of the Act and that are consistent with State law. Federal candidates and officeholders may no longer speak "without restriction or regulation" at any non-Federal fundraising event, consistent with the circuit court's decision in *Shays III.*

New 11 CFR 300.64(b)(2) provides that Federal candidates and officeholders may limit solicitations made at non-Federal fundraising events by displaying at the event a clear and conspicuous written notice or by making a clear and conspicuous oral statement that the solicitation is not for Levin funds (if the beneficiary of the fundraiser has a Levin fund account and is raising funds for that account), does not seek funds in excess of Federally permissible amounts, and does not seek funds from sources prohibited under the Act, including corporations, labor organizations, national banks, Federal contractors, or foreign nationals. A notice or statement limiting a solicitation will not be considered "clear and conspicuous" for purposes of the final rule if it is difficult to read or hear or if its placement is easily overlooked by any significant number of those in attendance. The Commission's regulation at 11 CFR 100.11(c) further informs the "clear and conspicuous" standard.

One example of a limited solicitation under new 11 CFR 300.64(b)(2) is for the Federal candidate or officeholder to say at a non-Federal fundraising event for a State or local candidate: "I am only asking for donations of up to $[applicable Federally permissible amount, currently $2,400 per election] from individuals and for donations of up to $[applicable Federally permissible amount, currently $5,000 per year] from multi-candidate political committees. I am not asking for donations in excess of these amounts or for donations from corporations, labor organizations, foreign nationals, Federal contractors, or national banks." When delivered to the general audience, this type of statement need be made only once; Federal candidates and officeholders are not obligated to repeat it during one-on-one discussions with individuals at the fundraising event. Federal candidates and officeholders may not, however, recite a limitation publicly, and then encourage event attendees to disregard the limitation during one-on-one discussions.

If a Federal candidate or officeholder wishes to make a general solicitation that does not expressly refer to the amount limitations and source

prohibitions of the Act at a non-Federal fundraising event, then the candidate or officeholder may limit the solicitation by displaying a clear and conspicuous written notice or by making a clear and conspicuous oral statement at the event that the solicitation is limited to funds that comply with the limitations and prohibitions of the Act. An example of an adequate written notice is a placard prominently displayed so that it cannot be overlooked at the entrance to a fundraising event for a State or local candidate at which the Federal candidate or officeholder is appearing, or a card placed on every table at the event, stating:

> Solicitations made by Federal candidates and officeholders at this event are limited by Federal law. The Federal candidates and officeholders speaking tonight are soliciting only donations of up to $[applicable Federally permissible amount, currently $2,400 per election] from individuals and up to $[applicable Federally permissible amount, currently $5,000 per year] from multi-candidate political committees. They are not soliciting donations in any amount from corporations, labor organizations, national banks, Federal contractors, or foreign nationals.

Alternatively, an event official or the Federal candidate or officeholder could make the same or a similar statement orally before any general solicitations are made by the Federal candidate or officeholder, such as in welcoming remarks to persons attending the fundraising event. These types of public, limiting statements need not be repeated in one-on-one discussions between the Federal candidate or officeholder and event attendees, so long as the Federal candidate or officeholder does not encourage event attendees to disregard the limitation during one-on-one discussions.

The provisions of new 11 CFR 300.64(b) are substantially the same as those proposed in paragraph (b) of Alternative 2 of the NPRM. Most of the comments on the proposal focused on the requirement that Federal candidates and officeholders limit their solicitations at non-Federal fundraising events. Two commenters asked the Commission to provide in its final rule more explicit guidance on how to limit such solicitations. In particular, the commenters requested additional examples of acceptable oral and written limitations and a clearer articulation of the "clear and conspicuous" standard. In response to these commenters, and to facilitate compliance with the regulations, the Commission has provided examples of acceptable statements.

Two other commenters suggested that it would be unnecessary and "awkward and confusing" to require Federal candidates and officeholders to limit their solicitations at non-Federal fundraising events with clear and conspicuous oral or written statements. The Commission concludes that any solicitation that is not limited either by its express terms or otherwise (such as through a clear and conspicuous oral statement or written notice) risks being understood as soliciting donations in amounts and from sources prohibited under the Act, especially if other individuals at the fundraising event explicitly solicit funds that are not consistent with the limitations and prohibitions of the Act. *See* 11 CFR 300.2(m) (defining "to solicit" to include "an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message, asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value").

C. 300.64(c)—Publicity for Non-Federal Fundraising Events

Paragraph (c) of new 11 CFR 300.64 addresses participation by Federal candidates and officeholders in publicity for non-Federal fundraising events. The final rule applies to Federal candidate and officeholder participation in all types of publicity for non-Federal fundraising events, including publicity soliciting funds. The term "publicity" as used in new 11 CFR 300.64 includes all methods used to publicize a non-Federal fundraising event, including advertisements, announcements, and pre-event invitations, regardless of form or medium (and includes phone calls, mail, e-mail, facsimile, and text messages), as well as follow-up contacts. New paragraph (c) is intended to ensure that Federal candidates and officeholders do not, in the course of publicizing a non-Federal fundraising event, solicit funds outside the amount limitations and source prohibitions of the Act.

Paragraph (c) of the final rules is substantially similar to paragraph (c) of Alternative 2 in the NPRM, except as described below. All commenters supported the Commission's proposal to address publicity for non-Federal fundraising events in the rule and to clarify guidance provided by the Commission in previous advisory opinions and Matters Under Review. As one commenter noted, "these rules regarding pre-event publicity in practice are what * * * really matter." Another commenter expressed a similar sentiment: "Frankly, once you're at the event, it's very rare that solicitations are ever made regardless. So it is appropriate that you've opened the door to revisiting the guidance and the rules regarding pre-event publicity. And clarity really is an important thing in these rules[.]"

1. 300.64(c)(1)—Publicity Not Containing a Solicitation

Paragraph (c)(1) of new 11 CFR 300.64 provides that if publicity for, or information about, a non-Federal fundraising event does not solicit funds, then Federal candidates, officeholders, or their agents may approve, authorize, agree to, or consent to the use of the Federal candidates' or officeholders' name and likenesses in it. Such publicity may, for example, use the name or likeness of a Federal candidate or officeholder to indicate that such person will attend, speak, or be a featured guest at the event. The publicity may also indicate the Federal candidate's or officeholder's involvement or role in the event. *See* discussion of paragraph (c)(3), below. No Federal disclaimer or attribution statement is required on such publicity.

Paragraph (c)(1) is nearly identical to proposed paragraph (c)(1) in Alternative 2 of the NPRM, except that it now explicitly applies to agents of Federal candidates and officeholders.

The Commission did not receive any comments specifically addressing this provision, although the commenters generally supported the Commission's proposed treatment of publicity for non-Federal fundraising events. One commenter, for example, indicated that the mere listing of a Federal candidate or officeholder on an invitation for a non-Federal fundraising event does not constitute a solicitation.

The Commission agrees that, in the context of publicity that does not otherwise contain a solicitation, merely approving, authorizing, agreeing to, or consenting to the use of the Federal candidate's or officeholder's name or likeness does not, in and of itself, constitute a solicitation by that Federal candidate or officeholder.

The Commission also concludes that paragraph (c)(1) gives full effect to 2 U.S.C. 441i(e)(3), as interpreted by the court in *Shays III,* which states that Federal candidates and officeholders may be featured guests at State, district, and local party committee fundraising events. One aspect of being a featured guest is being identified as such in publicity. Thus, paragraph (c)(1) is consistent with the Act and the *Shays III* court decision.

2. 300.64(c)(2)—Publicity Containing a Solicitation Limited to Funds That Comply With the Amount Limitations and Source Prohibitions of the Act

Paragraph (c)(2) of new 11 CFR 300.64 provides that Federal candidates, officeholders, or their agents may approve, authorize, agree to, or consent to the use of the Federal candidates' or officeholders' names and likenesses in publicity for a non-Federal fundraising event if the publicity solicits only funds that comply with the amount limitations and source prohibitions of the Act. Federal candidates and officeholders may be identified on the publicity in a manner specifically related to fundraising, such as honorary chairperson of the fundraising event, and may also sign the solicitation letters themselves, if the solicitation is limited to funds that comply with the amount limitations and source prohibitions of the Act.

This provision merely makes explicit what was implicit in the proposed rule, and reiterates what is expressly provided for in 2 U.S.C. 441i(e)(1): That Federal candidates and officeholders may solicit funds that comply with the amount limitations and source prohibitions of the Act.

3. 300.64(c)(3)—Publicity Containing a Solicitation Outside the Amount Limitations and Source Prohibitions of the Act

Paragraph (c)(3) of new 11 CFR 300.64 addresses publicity that solicits funds outside the amount limitations and source prohibitions of the Act or Levin funds. This provision is based on the Commission's determination that a Federal candidate, officeholder, or an agent of either may approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness on publicity for a non-Federal fundraising event in a manner that does not result in the solicitation being attributed to the Federal candidate or officeholder.

Under paragraph (c)(3)(i), a Federal candidate, officeholder, or an agent of either may approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness in publicity for a non-Federal fundraising event that contains a solicitation of funds outside the amount limitations and source prohibitions of the Act or Levin funds, but only if: (1) The Federal candidate or officeholder is identified in the publicity in a manner not specifically related to fundraising, and (2) the publicity includes a clear and conspicuous disclaimer that the solicitation is not being made by the Federal candidate or officeholder.

New 11 CFR 300.64(c)(3)(i)(A) provides nonexhaustive examples of the positions that a Federal candidate or officeholder may be identified as holding that are not specifically related to fundraising. They include featured guest, honored guest, special guest, featured speaker, or honored speaker. Thus, merely identifying a Federal candidate or officeholder as holding a position not specifically related to fundraising on publicity does not constitute a solicitation of funds outside the amount limitations and source prohibitions of the Act or Levin funds by the Federal candidate or officeholder. The Commission is not requiring that all Federal candidates or officeholders be identified by one of the listed titles. Rather, the Federal candidate or officeholder may be identified in any manner not specifically related to fundraising. For example, the Federal candidate or officeholder may be identified simply by name, as in "Please join the State Party at a reception with Senator Jones and Governor Smith."

To avoid any confusion in this regard, paragraph (c)(3)(i)(B) requires the publicity to include a clear and conspicuous disclaimer stating that the solicitation is not being made by the Federal candidate or officeholder. New 11 CFR 300.64(c)(3)(ii) provides that disclaimers on written publicity must meet the requirements in 11 CFR 110.11(c)(2). For publicity disseminated via non-written means, such as by telephone calls, a disclaimer is required if the publicity is recorded, follows any form of a written script, or is conducted according to a structured or organized program. A script for these purposes means any written text that callers use to guide their conversations with potential attendees, regardless of whether it takes the form of complete paragraphs, bullet points, notes, or other written prompts. As long as the text includes appropriate disclaimers, the Commission will presume (absent evidence to the contrary) that the requirements of the rule were met. When non-written solicitations are conducted according to a structured or organized program, the Commission will similarly presume that the requirements of the rule were met where a sworn statement that appropriate disclaimers were made is submitted by the person making the solicitation or by the Federal candidate or officeholder who authorized the use of his or her name. A structured or organized program includes the making, at a designated time, of telephone calls that invite people to and solicit funds for a non-Federal fundraising event, and which is authorized, requested, or agreed to by the Federal candidate or officeholder.

New paragraph (c)(3)(iv) provides two examples of disclaimers that would satisfy the requirement. Both examples state that the Federal candidate or officeholder is not soliciting funds in connection with the fundraising event. These examples are intended to serve as guidance for Federal candidates, officeholders, and sponsors of non-Federal fundraising events. Importantly, written disclaimers, including those that conform to the examples provided in the rule, are not sufficient unless they are "clear and conspicuous" under 11 CFR 110.11(c)(2). To the extent the publicity already has a disclaimer required by 11 CFR 100.11 (Federal disclaimer), the disclaimer required by this paragraph may be included in the same box as the Federal "Paid for by" disclaimer. Some additional limitations on the use of disclaimers are addressed in new paragraph (c)(3)(v) of 11 CFR 300.64, as discussed below.

Paragraph (c)(3)(v) of new 11 CFR 300.64 states that a Federal candidate, officeholder, or an agent of either may not approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness in publicity that contains a solicitation of non-Federal or Levin funds if the Federal candidate or officeholder is identified in the publicity as serving in a position specifically related to fundraising. Positions specifically related to fundraising include, for example, honorary chair of the fundraising event or member of the host committee. Nor may a Federal candidate, officeholder, or an agent of either approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness if the Federal candidate or officeholder is identified on publicity containing a solicitation of non-Federal or Levin funds as extending an invitation to the event. For example, an invitation stating "Featured guest Congressman X invites you to join him at next week's reception" would fall into this category, as would an invitation signed by the Federal candidate or officeholder.

The Commission has concluded that participation by the Federal candidate or officeholder in this manner would be an impermissible solicitation of funds outside the amount limitations and source prohibitions of the Act or Levin funds. As such, no disclaimer, even one that complies with paragraph (c)(3)(i)(B) of new 11 CFR 300.64, would be capable of curing the violation of 2 U.S.C.

441i(e), no matter how clear or conspicuous the disclaimer may be.

Finally, paragraph (c)(3)(vi) prohibits Federal candidates, officeholders, and their agents from disseminating publicity for a non-Federal fundraising event if the publicity solicits funds outside the amount limitations and source prohibitions of the Act or Levin funds. This paragraph is a logical outgrowth of the proposal in the NPRM; the Commission has decided to implement this provision to prohibit conduct that could result in an impermissible solicitation by Federal candidates and officeholders.

The final rule covers much of the same activity as the rule proposed in Alternative 2 of the NPRM, but is organized differently. The proposed rule did not, for example, explicitly address publicity that solicits only funds within the limitations and prohibitions of the Act, whereas the final rule does. More significantly, the structure of the proposed rule depended on whether the solicitation in the publicity was made by the Federal candidate or officeholder. By contrast, the structure of the final rule depends on whether the publicity solicits funds within the amount limitations and source prohibitions of the Act. The final rule also applies to the agents of Federal candidates and officeholders.

The comments received on this aspect of the proposed rule focused for the most part on the disclaimer requirement for publicity naming a Federal candidate or officeholder and including a solicitation by a person other than the Federal candidate or officeholder. Four commenters disagreed with the disclaimer requirement, arguing that the disclaimers would confuse the average person. These commenters observed that the average recipient of publicity could easily conclude that the mere listing of a Federal candidate or officeholder—as a featured guest, for example—on publicity was not a solicitation by that Federal candidate or officeholder, even if the publicity included a solicitation of funds outside the amount limitations and source prohibitions of the Act. Moreover, one commenter opined that fundraising hosts would bear a substantial burden if employees and volunteers were required to issue such disclaimers during the telephone calls and conversations that frequently follow the distribution of written publicity for a non-Federal fundraising event. Instead, two commenters suggested that the Commission require such disclaimers only when a Federal candidate or officeholder signs a solicitation or explicitly solicits funds.

Other commenters supported the Commission's proposed disclaimer requirement, stating that it would make "infinitely clear to the recipient of the solicitation" that the Federal candidate or officeholder was not asking for funds outside the limitations or prohibitions of the Act. Another commenter asked the Commission to provide specific examples of statements that would satisfy the disclaimer requirement.

The Commission has considered the comments and has concluded that identifying a Federal candidate or officeholder as serving in a role not specifically related to fundraising does not, by itself, result in a solicitation by the Federal candidate or officeholder. However, just as the circuit court concluded in *Shays III* that 2 U.S.C. 441i(e)(3) "merely clarifies" the reach of "the statute's ban on soliciting soft money," the Commission also seeks to make it unmistakably clear that Federal candidates and officeholders who participate at non-Federal fundraising events and in publicity are not making a solicitation that would be prohibited under the law. *Shays III* at 933. The disclaimer requirement helps to ensure that persons receiving publicity for non-Federal fundraising events understand that any solicitation of funds outside the amount limitations and source prohibitions of the Act is made by a person other than the Federal candidate or officeholder identified in the publicity. The disclaimer requirement may also help to protect Federal candidates and officeholders against complaints filed with the Commission that result from a misunderstanding as to who is soliciting funds in connection with the fundraising event.

D. Effect of This Rulemaking on Prior Commission Advisory Opinions

The Commission has addressed the issue of participation by Federal candidates and officeholders in non-Federal fundraising events in Advisory Opinions 2007–11 (California State Party Committees), 2005–02 (Corzine II), 2004–12 (Democrats for the West), 2003–36 (Republican Governors Association), and 2003–03 (Cantor). As explained below, the Commission is superseding the aspects of these advisory opinions that address this issue.

In Advisory Opinions 2005–02 (Corzine II) and 2004–12 (Democrats for the West), the Commission concluded, in part, that Federal candidates and officeholders could appear, speak, and be featured guests at non-Federal fundraising events "without restriction or regulation" under former 11 CFR 300.64(b). Given that this provision of the rule was explicitly struck down by the *Shays III* court and has been removed by the Commission, the Commission is superseding the parts of Advisory Opinions 2004–12 (Democrats for the West) and 2005–02 (Corzine II) that apply the "without restriction or regulation" standard. Specifically, the Commission is superseding the answer to Question 7 in Advisory Opinion 2004–12 (Democrats for the West), as to whether Democrats for the West may invite Federal candidates, officeholders, or their agents to appear as guests or featured speakers at fundraising events, and the second paragraph in the answer to Question 2 in Advisory Opinion 2005–02 (Corzine II), regarding Federal candidate and officeholder participation in raising funds for the non-Federal accounts of State and local party committees.

Advisory Opinions 2007–11 (California State Party Committees), 2003–36 (Republican Governors Association), and 2003–03 (Cantor) also addressed participation by Federal candidates and officeholders at non-Federal fundraising events in connection with elections, and related publicity. Some of the conclusions are consistent with new 11 CFR 300.64, such as the conclusion in Advisory Opinions 2003–36 (Republican Governors Association) and 2003–03 (Cantor) that the mere attendance of a Federal candidate or officeholder at a non-Federal fundraiser does not, in and of itself, give rise to a violation of the Act or Commission regulations. On the other hand, some of the conclusions in these prior advisory opinions may not be consistent with new 11 CFR 300.64.

To help avoid potential confusion as to which parts of the prior advisory opinions are consistent with the new rule and which parts are inconsistent, the Commission is superseding Advisory Opinion 2003–03 (Cantor), except for the answer to Question 6 regarding agency, and Advisory Opinion 2003–36 (Republican Governors Association), except for the answer to Question 3 regarding corporate donations to the Republican Governors Association's conference account and the last paragraph of the answer to Question 2 regarding whether the conference account's activities are in connection with an election. The Commission is also superseding in its entirety Advisory Opinion 2007–11 (California State Party Committees), which addressed three types of proposed communications related to State party fundraising events that identified Federal candidates or officeholders as featured speakers or honored guests.

These actions are consistent with a comment received in response to the NPRM. The comment noted the potential tension and confusion that could result from having to reconcile past advisory opinions with the Commission's new rule. The comment suggested that the Commission indicate explicitly that the series of advisory opinions on this issue no longer articulate the correct standard of law and are thus superseded.

The Commission agrees that where the new rule addresses the same issue as a prior advisory opinion, the new rule provides the applicable standard of law, and the advisory opinion is superseded. However, the Commission declines to supersede the entire series of advisory opinions that reference this issue. As discussed above, sections of certain advisory opinions are not affected by the new rule and hence remain in force. Accordingly, the Commission has explicitly indicated which advisory opinions are now superseded, in whole or in part. Although new 11 CFR 300.64 is in part informed by, and adopts, some of the Commission's conclusions in prior advisory opinions, the new rule is based entirely on the reasoning set forth in this explanation and justification and does not rely on any prior Commission advisory opinions.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) [Regulatory Flexibility Act]

The Commission certifies that the attached final rule will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the entities affected by this rule do not meet the definition of "small entity" under 5 U.S.C. 601. That definition requires that the enterprise be independently owned and operated and not dominate in its field. 5 U.S.C. 601(4).

This final rule affects State, district, and local party committees, as well as Federal candidates and their campaign committees. Federal candidates, as individuals, do not fall within the definition at 5 U.S.C. 601, and campaign committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals.

State, district, and local party committees also fall outside the definition of "small entity." These committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arenas of their States and are thus dominant in their fields. District and local party committees are generally considered affiliated with the State committees and need not be considered separately. To the extent that any State party committees representing minor political parties might be considered "small organizations," the number affected by this final rule is not substantial.

List of Subjects in 11 CFR Part 300

Campaign funds, nonprofit organizations, political committees and parties, political candidates, reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, Subchapter C of Chapter 1 of title 11 of the Code of Federal Regulations is amended to read as follows:

PART 300—NON-FEDERAL FUNDS

■ 1. The authority citation for part 300 continues to read as follows:

Authority: 2 U.S.C. 434(e), 438(a)(8), 441a(a), 441i, 453.

■ 2. Section 300.64 is revised to read as follows:

§ 300.64 Participation by Federal candidates and officeholders at non-Federal fundraising events (2 U.S.C. 441i(e)(1) and (3)).

(a) *Scope.* This section covers participation by Federal candidates and officeholders at fundraising events in connection with an election for Federal office or any non-Federal election at which funds outside the amount limitations and source prohibitions of the Act or Levin funds are solicited. This section also covers participation by Federal candidates and officeholders in publicity related to such non-Federal fundraising events. This section applies even if funds that comply with the amount limitations and source prohibitions of the Act are also solicited at the event. Nothing in this section shall be construed to alter the fundraising exception for State candidates at 11 CFR 300.63 or the fundraising exceptions for certain tax-exempt organizations at 11 CFR 300.65.

(b) *Participation at non-Federal fundraising events.* A Federal candidate or officeholder may:

(1) Attend, speak at, or be a featured guest at a non-Federal fundraising event.

(2) Solicit funds at a non-Federal fundraising event, provided that the solicitation is limited to funds that comply with the amount limitations and source prohibitions of the Act and that are consistent with State law.

(i) A Federal candidate or officeholder may limit such a solicitation by displaying at the fundraising event a clear and conspicuous written notice, or making a clear and conspicuous oral statement, that the solicitation is not for Levin funds (when applicable), does not seek funds in excess of $[Federally permissible amount], and does not seek funds from corporations, labor organizations, national banks, federal government contractors, or foreign nationals.

(ii) A written notice or oral statement is not clear and conspicuous if it is difficult to read or hear or if its placement is easily overlooked by any significant number of those in attendance.

(c) *Publicity for non-Federal fundraising events.* For the purposes of this paragraph, publicity for a non-Federal fundraising event includes, but is not limited to, advertisements, announcements, or pre-event invitation materials, regardless of format or medium of communication.

(1) *Publicity not containing a solicitation.* A Federal candidate, officeholder, or an agent of either may approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness in publicity for a non-Federal fundraising event that does not contain a solicitation.

(2) *Publicity containing a solicitation limited to funds that comply with the amount limitations and source prohibitions of the Act.* A Federal candidate, officeholder, or an agent of either may approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness in publicity for a non-Federal fundraising event that solicits only funds that comply with the amount limitations and source prohibitions of the Act.

(3) *Publicity containing a solicitation of funds outside the amount limitations and source prohibitions of the Act.*

(i) A Federal candidate, officeholder, or an agent of either may approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness in publicity for a non-Federal fundraising event that contains a solicitation of funds outside the amount limitations and source prohibitions of the Act or Levin funds only if:

(A) The Federal candidate or officeholder is identified as a featured guest, honored guest, special guest,

featured speaker, or honored speaker, or in any other manner not specifically related to fundraising; and

(B) The publicity includes a clear and conspicuous disclaimer that the solicitation is not being made by the Federal candidate or officeholder.

(ii) The disclaimer required in paragraph (c)(3)(i)(B) of this section must meet the requirements in 11 CFR 110.11(c)(2) if the publicity is written.

(iii) Where publicity is disseminated by non-written means, the disclaimer described in paragraph (c)(3)(i)(B) of this section is required only if the publicity is recorded or follows any form of written script or is conducted according to a structured or organized program.

(iv) Examples of disclaimers that satisfy paragraph (c)(3)(i)(B) of this section include, but are not limited to:

(A) "[Name of Federal candidate/officeholder] is appearing at this event only as a featured speaker. [Federal candidate/officeholder] is not asking for funds or donations"; or

(B) "All funds solicited in connection with this event are by [name of non-Federal candidate or entity], and not by [Federal candidate/officeholder]."

(v) A Federal candidate, officeholder, or an agent of either may not approve, authorize, agree to, or consent to the use of the Federal candidate's or officeholder's name or likeness in publicity for a non-Federal fundraising event that contains a solicitation of funds outside the amount limitations and source prohibitions of the Act or Levin funds if:

(A) The Federal candidate or officeholder is identified as serving in a position specifically related to fundraising, such as honorary chairperson or member of a host committee, or is identified in the publicity as extending an invitation to the event, even if the communication contains a written disclaimer as described in paragraph (c)(3)(i)(B) of this section; or

(B) The Federal candidate or officeholder signs the communication, even if the communication contains a written disclaimer as described in paragraph (c)(3)(i)(B) of this section.

(vi) A Federal candidate, officeholder, or an agent of either, may not disseminate publicity for a non-Federal fundraising event that contains a solicitation of funds outside the amount limitations and source prohibitions of the Act or Levin funds by someone other than the Federal candidate or officeholder.

Dated: April 30, 2010.

On behalf of the Commission.

Matthew S. Petersen,

Chairman, Federal Election Commission.

[FR Doc. 2010–10571 Filed 5–4–10; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 204

[Regulation D; Docket No. R–1381]

Reserve Requirements of Depository Institutions Policy on Payment System Risk

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board is amending Regulation D, Reserve Requirements of Depository Institutions, to authorize Reserve Banks to offer term deposits. Term deposits are intended to facilitate the conduct of monetary policy by providing a tool for managing the aggregate quantity of reserve balances. Institutions eligible to receive earnings on their balances in accounts at Federal Reserve Banks ("eligible institutions") may hold term deposits and receive earnings at a rate that does not exceed the general level of short-term interest rates. Term deposits are separate and distinct from balances maintained in an institution's master account at a Reserve Bank ("master account") as well as from those maintained in an excess balance account. Term deposits do not satisfy an institution's required reserve balance or contractual clearing balance and do not constitute excess balances. Term deposits are not available to clear payments and may not be used to reduce an institution's daylight or overnight overdrafts. The Board is also making minor amendments to the posting rules for intraday debits and credits to master accounts as set forth in the Board's Policy on Payment System Risk to address transactions associated with term deposits.

DATES: The amendments are effective on June 4, 2010.

FOR FURTHER INFORMATION CONTACT: Sophia H. Allison, Senior Counsel (202) 452–3565, or Dena L. Milligan, Staff Attorney (202) 452–3900), Legal Division, or Seth Carpenter, Associate Director (202) 452–2385, or Margaret Gillis DeBoer, Assistant Director (202) 452–3139, Division of Monetary Affairs; for users of Telecommunications Device for the Deaf (TDD) only, contact (202) 263–4869); Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

SUPPLEMENTARY INFORMATION:

I. Summary of Proposal

In order to help the Federal Reserve implement monetary policy, on December 31, 2009, the Board requested public comment on a proposal to amend Regulation D to authorize Reserve Banks to offer term deposits to eligible institutions.[1] "Eligible institution" is defined in Regulation D and includes the depository institutions defined in section 19(b)(1)(A) of the Act, including banks, savings associations, savings banks and credit unions that are federally insured or eligible to apply for federal insurance. "Eligible institution" also includes trust companies, Edge and agreement corporations, and U.S. agencies and branches of foreign banks.[2] Under the proposal, the Reserve Banks would accept term deposits subject to such terms and conditions as the Board may establish from time to time, including but not limited to conditions regarding the maturity of the term deposits being offered, maximum and minimum amounts that may be maintained by an eligible institution in a term deposit, the interest rate or rates offered and, if term deposits are offered through an auction mechanism, the size of the offering, and maximum and minimum bid amounts. Term deposits would not satisfy required reserve balances or contractual clearing balances and would not be available for general payments or other activities.

The Board also proposed to amend section 204.10(b)(3) of Regulation D to reflect the fact that term deposits would earn interest, and that like other balances maintained at Reserve Banks by or on behalf of eligible institutions, the interest rate on term deposits could not exceed the general level of short-term interest rates, consistent with the limitation in the Federal Reserve Act.[3] For purposes of that statutory requirement, the Board proposed to amend section 204.10(b)(3) to define the term "short-term interest rates" as including "the primary credit rate and rates on obligations with maturities of up to one year in which eligible institutions may invest, such as rates on term federal funds, term repurchase agreements, commercial paper, term Eurodollar deposits, and other similar rates."

[1] 74 FR 69301 (Dec. 31, 2009).

[2] "Eligible institution" does not include all entities for which the Reserve Banks hold accounts. For example, the term does not include entities for which the Reserve Banks act as fiscal agents, such as Federal Home Loan Banks, Fannie Mae, and Freddie Mac. 12 CFR 204.2(y).

[3] *See* 12 U.S.C. 461(b)(12).

II. Summary of Comments

The Board's proposal indicated that the Federal Reserve could offer term deposits in several ways and outlined a potential structure for offering term deposits through auctions. The Board requested comment on all aspects of the proposal, and specifically requested comment on three topics:

(1) Whether it is necessary to place any limitations on the maximum amount of term deposits that an institution may hold or on the maximum portion of a single offering that an institution may win at auction;

(2) What maturity or maturities would eligible institutions recommend as appropriate for term deposits, and whether more than one maturity should be offered; and

(3) Whether basic terms and structures for term deposits other than those described in the proposal should be considered.

The Board received twenty-two comments on the proposal. Comments were received from eight individuals, two foreign central banks, four bankers' banks, four commercial banks, and four trade associations.

Many commenters supported term deposits as an additional tool for draining excess reserves balances to support the effective implementation of monetary policy and stated that offering term deposits would not be disruptive to markets. Some commenters believed that term deposits would be effective in draining excess reserves balances, but questioned the underlying policies of reducing the availability of federal funds and putting upward pressure on the cost of borrowing. Additionally, a few commenters asked that the Board more clearly express the purpose of term deposits. A few other commenters questioned the effectiveness and necessity of term deposits as a monetary policy tool. Two commenters suggested that if the use of term deposits is temporary, the Board's final rule should announce a sunset date for the facility.

III. Final Rule

The Board expects term deposits to be one of several tools that could be employed to drain reserve balances and support the effective implementation of monetary policy. Term deposits drain reserve balances because the funds that pay for the term deposits are removed from the accounts of participating institutions for the life of the term deposit. Reducing the quantity of reserve balances should tighten the link between the interest rate the Federal Reserve pays on excess reserve balances and other short-term interest rates, resulting in improved control in implementing monetary policy. Authorization of term deposits does not, however, preclude the use of other tools to drain reserve balances.

Because of the potential usefulness of term deposits in implementing monetary policy, the Board has determined to adopt the proposed amendments to Regulation D with some changes to address issues raised by commenters and other issues. In doing so, the Board has determined not to adopt a sunset provision for these amendments. Actual offerings of term deposits, however, will occur as needed based on monetary policy objectives. Details about the periods when term deposits will be offered will be announced periodically in order to allow institutions to adjust their use of this facility.

The final rule also adjusts the definition of "short-term interest rates" in two ways. First, it has been amended to clarify that interest rates with maturities equal to one year would be "short term." Second, it has been changed to allow reference to interest rates on instruments with the relevant maturities but that may not be eligible for investment by eligible institutions. These changes result in a definition of "short-term interest rates" that is more consistent with market practice and understanding of the term.

The Board is also revising proposed section 204.10(e)(1) to clarify that the Board may from time to time set conditions regarding the early withdrawal of term deposits and pledging term deposits as collateral. As discussed *infra,* the Board is not at this time finalizing those conditions.

The Board also is revising proposed section 204.10(e)(3) to clarify that term deposits may not be used for general payments or settlement activities.

IV. Terms and Conditions of Term Deposit Offerings

As explained above, the Board requested and received comment on a variety of matters related to the structure, amount and method for offering term deposits. Final determination of those matters depends largely on related monetary policy discussions, including decisions regarding the most effective way to drain the appropriate level of reserves. As a result, the Board has determined to finalize the parts of its proposal that facilitate the authorization of term deposits and to reserve to a later date the final decisions regarding the manner in which term deposits will be offered (for example, by auction, by open offer or by some other method) and the details of those offerings.

In making those final decisions as to the terms and conditions of term deposits, the Board will take into account the comments received in this process. In order to aid institutions in preparing for the availability of term deposits, the Board is providing its preliminary views on several of those matters while reserving final judgment on all of these matters in order to adjust the decisions to most effectively implement the Federal Reserve's monetary policy objectives. For one of these matters (role of correspondents), however, the Board has made a final determination in order to allow potential participants to begin now to formulate plans and structures for participating in term deposits.

To help eligible institutions to become familiar with the term deposit process, the Federal Reserve anticipates that it will conduct small-value offerings of term deposits in the coming months. More detailed information about these offerings, as well as information about how to participate in these offerings and term deposit offerings generally, will be provided at a later date.

A. Correspondents

Some commenters expressed concerns that the proposal would disadvantage private-sector correspondents. These commenters argued that private-sector correspondent institutions likely would be unable to compete with term deposits offered by Reserve Banks and that term deposits would thus jeopardize existing correspondent-respondent relationships. These commenters indicated that term deposits would likely earn a higher interest rate than other similar term investments or overnight investments, would carry no risk and would be available to pledge as collateral for discount window advances.

These commenters proposed that, in order to mitigate unintended strain on existing correspondent-respondent relationships, correspondent institutions be permitted to aggregate their respondents' funds and maintain those funds in term deposits on behalf of their respondents. Commenters also proposed that correspondents be permitted to bid on term deposits as agent for their respondents, even on an individual or unaggregated basis. According to these commenters, small institutions cannot justify the staff resources required to participate actively in the proposed term deposit offerings, and instead could more effectively and efficiently participate in those offerings by placing funds with a

correspondent acting as aggregator or as agent, or both. These commenters indicated that allowing correspondents to aggregate the funds of smaller institutions in a single term deposit account would provide an efficient mechanism for correspondents to invest on behalf of their respondents, would allow small institutions to compete for term deposits by overcoming a high minimum bid amount and aggressive bidding on the rates by larger institutions. The commenters also asserted that allowing correspondents to hold term deposits as agents would be consistent with the existing provisions of Regulation D relating to excess balance accounts. Finally, these commenters asserted that the offering of term deposits was a "service" in direct competition with private-sector deposits and funds management services, and therefore the rates paid should be subject to a private-sector adjustment factor under section 11A of the Federal Reserve Act.

The Board has carefully considered these comments and has determined not to authorize the aggregation of funds of multiple respondents in a single term deposit that is managed by a correspondent as agent. However, correspondents will be able to facilitate respondent participation in term deposit offerings, such as by submitting a tender on behalf of each respondent that authorizes the correspondent to do so. Because of operational complexities and other accommodations being made to enable the participation by small institutions, the Board will not allow a correspondent to submit as agent a single tender for the aggregate quantity of term deposits that its respondents wish to hold. Correspondents that are eligible institutions would be able to participate in term deposit offerings for their own account.

As noted above, some commenters argued that term deposits were a "service" in direct competition with private-sector correspondent institutions, and therefore should be subject to a private-sector adjustment factor under section 11A of the Federal Reserve Act.

Section 11A of the Act was added by the Monetary Control Act of 1980 ("MCA") to promote competitive equality between member and nonmember banks and to improve the efficiency of the nation's payments mechanism by making specific Reserve Bank services, known as "priced services," available to all depository institutions at a competitive price. Section 11A requires the Board to establish pricing principles and a schedule of fees to cover the specified Reserve Bank "priced services"[4] in order to enable private-sector service providers to compete more effectively with Reserve Banks.[5] The Federal Reserve's governmental-type functions (such as conducting monetary policy) were not intended to be included as "services" covered by MCA's pricing principles.[6] As stated in the proposal, offering term deposits is a tool to drain excess reserves balances and support the effective implementation of monetary policy. Accordingly, even though private-sector correspondents may offer some investments that are similar in certain respects to term deposits, the offering of term deposits is not a "service" that is subject to the pricing principles of Section 11A of the Act. Finally, as noted above, rates on term deposits are subject to an independent statutory limit: these rates may not exceed the general level of short-term interest rates.[7]

B. Maturities of Term Deposits

The Board also requested comment on the appropriate maturity or maturities for term deposits, and on whether more than one maturity should be offered. The Board's proposal suggested that term deposit maturities would not exceed one year and likely would be between one and six months. The proposal also suggested that term deposit maturities could be aligned with 14-day reserve maintenance periods.

Commenters generally supported offering term deposits with multiple maturities in order to help institutions manage their liquidity positions and interest-rate risk, and suggested maturities for term deposits ranging from 14 days to one year. Two commenters suggested that term deposits of varying maturities could be offered in a single offering, and one commenter suggested that term deposits of multiple maturities be offered from the first auction. One commenter suggested that term deposits with shorter maturities be offered regularly, with less frequent offerings of term deposits with six-month maturities. Generally, commenters felt that demand would be greatest for term deposits with maturities less than six months.

Several commenters supported maturities that were multiples of 14 days to coincide with reserve maintenance periods. Many of these commenters specifically suggested maturities that mirrored the maturities of advances under the Federal Reserve's Term Auction Facility (TAF) (those maturities have generally been 28 days and 84 days), or maturities of U.S. Treasury debt offerings or other investments similar to term deposits. Another commenter suggested that term deposit maturities not exceed three months (approximately twice the time between Federal Open Market Committee meetings), because institutions could establish reasonable interest rate expectations over a three-month period.

In recognition of the demand to hold term deposits of varying maturities, the Board expects that term deposits of more than one maturity will be offered and that maturities of term deposits likely will be six months or less. The Board also expects that term deposit maturities will be aligned with 14-day reserve maintenance periods. Maturities will be announced in advance of a term deposit offering.

C. Early Withdrawal

Some commenters requested that the Board reconsider its proposal to prohibit early withdrawal of term deposits. Two commenters suggested that institutions be permitted to make early withdrawals of term deposits for a fee; one of these commenters suggested that early withdrawals be limited to term deposits with maturities of 28 days or more. Both commenters cited the ability to maintain flexibility in the event of changing financial circumstances.

The Board believes that, as stated in the proposal, early withdrawal of term deposits would weaken the ability of term deposits to serve as an effective tool for draining reserve balances, and therefore would undermine the effective implementation of monetary policy. Accordingly, the Board expects that early withdrawals from term deposits will not be permitted.

D. Offering Mechanism

The Board's proposal described a potential auction mechanism for offering term deposits. The Board received several comments (discussed below) related specifically to offering term deposits through an auction, none of which opposed using an auction mechanism. The Board expects that an auction mechanism may be the most

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[4] Section 11A(b) lists the services which the Board must include in its schedule of fees: Currency and coin services; check clearing and collection services; wire transfer services; automated clearinghouse services; settlement services; securities and safekeeping services; Federal Reserve float, and "[a]ny new services which the Federal Reserve System offers, including but not limited to payment services to effectuate the electronic transfer of funds." 12 U.S.C. 248a.

[5] *See* 125 CONG. REC. 525 (1979) (statement of Sen. Proxmire).

[6] *Monetary Control and the Membership Problem: Hearing on H.R. 12706, Before the H. Comm. On Fin. Svcs.,* 95th Cong. 127 (1978) (Federal Reserve Board's Preliminary Proposal).

[7] 12 U.S.C. 461(b).

effective way to allocate term deposits in a manner that effectively achieves the Federal Reserve's monetary policy objectives. Based on monetary policy considerations and experience with the auction mechanism, the Board may consider offering term deposits through different mechanisms.

As stated above, the Board is not at this time setting forth definitive terms and conditions of term deposit offerings (*e.g.,* the maximum interest rate for an offering). The Board will take the comments received into consideration when determining the terms and conditions. Many commenters expressed a desire for the Federal Reserve to communicate in advance the terms and conditions of the offerings, as well as the purpose and desired outcome of the program. The Board anticipates announcing the terms and conditions of any auction in advance, including the quantity of term deposits offered and their maturity, any minimum and maximum bid amounts, and a maximum-allowable bid interest rate.

One commenter suggested that the Board provide notice and an opportunity to comment prior to changing the terms and conditions of term deposit offerings. The amendments to Regulation D adopted by the Board were designed to be sufficiently flexible to support various approaches to term deposit offerings, including auctions or posted-rate term deposit offerings, and offerings of varying amounts, maturities, and interest rates. This flexibility is necessary to enable the Board to adjust the terms and conditions based on evolving market conditions and monetary policy needs. The Board does not expect to seek comment in advance of changing the terms and conditions of term deposit offerings unless those changes require amendments to Regulation D.

One commenter suggested that each institution be permitted to submit multiple bids and proposed a maximum of two bids per institution at each auction. The Board is considering permitting multiple bids per institution for term deposits and anticipates that, if multiple bids are permitted, there will likely be some limit on the number of bids an institution may submit.

E. Interest Rate or Rates Offered

The Board received a number of comments on term deposit interest rates. Some commenters supported structuring auction bids as fixed-rate bids, and others suggested that bids be in the form of a spread over a reference rate, resulting in a floating rate. Commenters supporting a floating rate suggested specific reference rates such as the target federal funds rate, the rate paid on required reserves, the rate paid on excess reserves, and the overnight indexed swap rate.

In addition, the Board received several comments related to setting the maximum interest rate on term deposits. One commenter supported maintaining flexibility as to the benchmark rates considered when setting the maximum interest rate. One commenter stated that for term deposits of longer maturities, the primary credit rate was not necessarily an appropriate maximum rate; rather, this commenter suggested that auctions of term deposits of longer maturities have a higher maximum rate, where the increase relative to the rates on term deposits with shorter maturities is consistent with the steepness of the yield curve.

The Board did not receive any comments related to determining the "general level" of short-term interest rates. In identifying the "general level" of short-term interest rates, the Board could look to a specific short-term interest rate, or to a range of such rates. The "general level" of short-term interest rates could include both fixed and floating rates and will vary over time in accordance with movements in short-term interest rates. As short-term interest rates may move within the maturity period of a term deposit, the Board will consider the applicable "general level" for any particular term deposit offering to be the general level of short-term interest rates at the time the rate for that particular offering is established.

In accordance with statutory requirements, the maximum interest rate for each offering will not exceed the general level of short-term interest rates. The maximum interest rate for a given offering will be announced in advance of that offering. The Board expects that interest rates on term deposits initially will be fixed, although the Board may consider floating-rate term deposits based on future experience with term deposit offerings.

F. Noncompetitive Tenders

One commenter suggested allowing small institutions to make noncompetitive tenders, similar to auctions for Treasury securities. The Board will consider including a noncompetitive tender feature whereby small institutions could submit a tender outside the competitive bidding process for the quantity of term deposits they wish to hold and receive the rate established by the competitive auction.

G. Individual Limits on Maximum Amount of Deposit

The Board specifically requested comment on whether limitations on the amount an eligible institution may maintain as term deposits were necessary. Many commenters suggested placing some limitation on the amount of term deposits that a single institution can hold. The limitations on an institution's term deposit holdings suggested by various commenters included restrictions based on (1) A percentage of an institution's capital; (2) an institution's average daily balance in its master account over the prior three months, and (3) 10 percent of total term deposits outstanding.

Some of these commenters asserted that limiting the amount of a single offering that any institution can be awarded would ensure that small depository institutions effectively have access to term deposits, foster greater participation in the program, and curb the ability of a few large institutions to dominate term deposit offerings. Proposals suggested by these commenters included *de minimis* minimum bid amounts, and limits based on auction size (*e.g.,* limiting any one institution to between 5 percent and 25 percent of a single auction). Another commenter suggested imposing such limitations only on the twenty largest institutions.

The Board expects to implement the term deposit program in a way that promotes equitable access to term deposits for institutions of all sizes, while most effectively meeting the Federal Reserve's monetary policy objectives. Eligible institutions would not be required to maintain required reserve balances at Reserve Banks in order to hold term deposits, nor would they need to maintain a master account at a Reserve Bank in order to participate in term deposit offerings. The Board also expects to set minimum bid amounts for term deposit offerings low enough so as to not be a barrier to participation by smaller institutions.

H. Use as Collateral

Several commenters raised concerns related to the potential availability of term deposits to satisfy unexpected liquidity needs of the depositor. In addition, two commenters suggested that term deposits be available to pledge as collateral for advances by Federal Home Loan Banks so that institutions would be able to meet liquidity needs through mechanisms other than the discount window. One of these commenters suggested that term

deposits be available to pledge as collateral for any interbank loan.

The potential complexity of administering pledges (and re-pledges) of term deposits as collateral to third parties throughout the term of the deposit could be substantial. The Board expects that institutions will be permitted to use their term deposits as collateral for discount window advances in order to manage unanticipated funding needs. This would allow institutions to obtain liquidity from the Federal Reserve by pledging term deposits or to obtain liquidity from other sources by substituting term deposits for other types of collateral pledged to the discount window that could then be pledged as collateral to secure advances from Federal Home Loan Banks and other third parties. Accordingly, the Board does not expect to permit pledges of term deposits to third parties.

In 2008, the Board announced revisions to its Policy on Payment System Risk ("Revised PSR Policy").[8] Under the Revised PSR Policy, collateralized daylight overdrafts would incur no fee.[9] The Board received many comments supporting the availability of term deposits to collateralize daylight overdrafts. The Board expects that term deposits will be available to collateralize daylight overdrafts under the Revised PSR Policy.[10]

V. Final Amendments to PSR Policy Posting Rules

The Reserve Banks measure depository institutions' intraday account balances according to a set of posting rules outlined in the Board's Policy on Payment System Risk (PSR Policy).[11] To reflect the settlement of term deposits in the posting rules, the Board is amending section II.A. of the PSR Policy under the heading "Procedures for Measuring Daylight Overdrafts" as follows (changes identified by *italics*):

Procedures for Measuring Daylight Overdrafts

Opening Balance (Previous Day's Closing Balance)

Post at 8:30 a.m. Eastern Time:

+ *Term deposit maturities and accrued interest*

Post After the Close of Fedwire Funds Service:

+/− All other transactions. These transactions include the following: Local Federal Reserve Bank checks presented after 3 p.m. Eastern Time but before 3 p.m. local time; noncash collection; currency and coin shipments; small-dollar credit adjustments; *term deposit settlements;* and all debit adjustments.

The Board received no comments on the proposed amendments to the PSR Policy and is adopting them as proposed. These amendments to the PSR Policy will be effective at the same time as the amendments to Regulation D.[12]

VI. Solicitation of Comments Regarding use of "Plain Language"

Section 722 of the Gramm-Leach-Bliley Act of 1999 (12 U.S.C. 4809) requires the Board to use "plain language" in all final rules published after January 1, 2000. The Board has sought to present this final rule in a simple and straightforward manner. The Board received no comments on whether the proposed rule was clearly stated and effectively organized, or on how the Board might make the text of the rule easier to understand.

VII. Regulatory Flexibility Act

An initial regulatory flexibility analysis (IRFA) was included in the Board's proposed rule in accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*). In the IRFA, the Board specifically solicited comment on significant alternatives that would minimize the impact of the proposal on small entities. The Board's final regulatory flexibility analysis is set forth below. For purposes of this analysis, banks and other depository institutions are considered "small" if they have less than $175 million in assets. For the reasons stated below, the Board expects that the final rule will not have a significant economic impact on small entities.

1. Statement of the Need for and the Objectives of the Final Rule

The Board is publishing final amendments to Regulation D to authorize Reserve Banks to offer interest-bearing deposits of specified maturities to eligible institutions. Term deposits are intended to facilitate the conduct of monetary policy by providing a tool for managing the aggregate quantity of reserve balances. Additional discussion of the need for and objectives of the final rule is contained in the **SUPPLEMENTARY INFORMATION** above.

2. Summary of Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

Although the Board received no comments that were specifically in response to the IRFA, the Board received comments regarding the proposal's impact on small entities. As discussed in the **SUPPLEMENTARY INFORMATION** above, some commenters expressed concern about small institutions' ability to participate in term deposit offerings and to compete with larger institutions in the offerings, particularly if an auction mechanism were used. To address these concerns, commenters suggested that minimum bid amounts for auctions be set sufficiently low to allow smaller institutions to participate and suggested that noncompetitive tenders be offered alongside competitive auctions. Some commenters also suggested that there be limits on the portions of offerings a single institution could be awarded so as to prevent larger institutions from being awarded an entire offering.

As discussed above, the Board expects to implement term deposits in a way that promotes the access of small entities to term deposits.

3. Small Entities Affected by the Final Rule

Participation in term deposit offerings would be optional for eligible institutions of all sizes. The Board estimates that approximately 16,010 would be eligible to hold term deposits, of which approximately 12,267 would be considered "small" for purposes of the RFA (entities with assets of $175 million or less). The impact on eligible institutions choosing to hold term deposits would be positive, because term deposits would expand the range of investment opportunities available to those institutions.

4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements of the Final Rule

The final rule does not impose any new reporting, recordkeeping or compliance requirements.

5. Significant Alternatives to the Revisions of the Final Rule

The Board received no comments suggesting significant alternatives to the proposed rule that would minimize the impact of the rule on small institutions. The final rule, like the proposed rule, provides the Board with significant

[8] 73 FR 79109 (Dec. 24, 2008).

[9] 73 FR 79109, 79114 (Dec. 24, 2008).

[10] The Board anticipates implementing the Revised PSR Policy in late 2010 or early 2011. The Board will announce the specific date at least 90 days in advance of the implementation date. 74 FR. 79117 (Dec. 24, 2008).

[11] Available at *http://www.federalreserve.gov/paymentsystems/psr_policy.htm.*

[12] See n. 10, *supra,* and accompanying text regarding the effective date of other amendments to the PSR Policy relating to the ability of term deposits to serve as collateral for daylight overdrafts.

flexibility to structure the terms and conditions for term deposit offerings to minimize any adverse effects on small institutions. The Board will set terms and conditions of term deposit offerings that promote the access of small institutions to term deposits while still maintaining the effectiveness of term deposits as a tool to implement monetary policy. These steps could include those suggested by commenters, such as low minimum bid amounts, aggregate limits, and noncompetitive tenders.

VIII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR 1320 Appendix A.1), the Board reviewed the final rule under the authority delegated to the Board by the Office of Management and Budget (OMB). The final rule contains no collections of information subject to the PRA.

List of Subjects in 12 CFR Part 204

Banks, banking, Reporting and recordkeeping requirements.

Authority and Issuance

■ For the reasons set forth in the preamble, the Board is proposing to amend 12 CFR part 204 as follows:

PART 204—RESERVE REQUIREMENTS OF DEPOSITORY INSTITUTIONS (REGULATION D)

■ 1. The authority citation for Part 204 continues to read as follows:

Authority: 12 U.S.C. 248(a), 248(c), 371a, 461, 601, 611, and 6105.

■ 2. Amend § 204.2 by adding paragraph (dd) to read as follows:

§ 204.2 Definitions.

* * * * *

(dd) *Term deposit* means those funds of an eligible institution that are maintained by that institution for a specified maturity at a Federal Reserve Bank pursuant to section 204.10(e) of this part.

■ 3. Section 204.10 is amended by revising paragraph (b)(3) and by adding a new paragraph (e) to read as follows:

§ 204.10 Payment of interest on balances.

* * * * *

(b) * * *

(3) For required reserve balances, excess balances, and term deposits, at any other rate or rates as determined by the Board from time to time, not to exceed the general level of short-term interest rates. For purposes of this subsection, "short-term interest rates" are rates on obligations with maturities of no more than one year, such as the primary credit rate and rates on term federal funds, term repurchase agreements, commercial paper, term Eurodollar deposits, and other similar instruments.

* * * * *

(e) *Term deposits.* (1) A Federal Reserve Bank may accept term deposits from eligible institutions under the provisions of this paragraph (e) subject to such terms and conditions as the Board may establish from time to time, including but not limited to conditions regarding the maturity of the term deposits being offered, maximum and minimum amounts that may be maintained by an eligible institution in a term deposit, the interest rate or rates offered, early withdrawal of term deposits, pledging term deposits as collateral and, if term deposits are offered through an auction mechanism, the size of the offering, maximum and minimum bid amounts, and other relevant terms.

(2) A term deposit will not satisfy any institution's required reserve balance or contractual clearing balance.

(3) A term deposit may not be used for general payments or settlement activities.

By order of the Board of Governors of the Federal Reserve System, April 29, 2010.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 2010–10483 Filed 5–4–10; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2010–0435; Directorate Identifier 2010–NM–084–AD; Amendment 39–16283; AD 2010–10–04]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Model DHC–8–400 Series Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for the products listed above. This AD results from mandatory continuing airworthiness information (MCAI) originated by an aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as:

Operators of DHC–8 400 Series aeroplanes have been reporting chafing of wires in the AC wire harnesses located along the lower wing shroud on either wing resulting in a loss of various system services. Chafed wires may lead to arcing, local overheating and AC generator failure. The AC generators provide power to the anti-icing heaters, including pitot/static heater, engine adapter heater, and propeller heater. Failure of both AC generators would result in the loss of these systems and poses a safety concern.

* * * * *

Loss of both AC generators could lead to unannunciated loss of heat to both engine inlets, which could lead to loss of power in both engines during icing conditions. This AD requires actions that are intended to address the unsafe condition described in the MCAI.

DATES: This AD becomes effective May 20, 2010.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of May 20, 2010.

We must receive comments on this AD by June 21, 2010.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–40, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

You may examine the AD docket on the Internet at *http://www.regulations.gov;* or in person at the Docket Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Craig Yates, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office, 1600 Stewart Avenue, Suite 410, Westbury,

New York 11590; telephone (516) 228–7355; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

Transport Canada Civil Aviation (TCCA), which is the aviation authority for Canada, has issued Canadian Airworthiness Directive CF–2010–08, dated March 16, 2010 (referred to after this as "the MCAI"), to correct an unsafe condition for the specified products. The MCAI states:

> Operators of DHC–8 400 Series aeroplanes have been reporting chafing of wires in the AC wire harnesses located along the lower wing shroud on either wing resulting in a loss of various system services. Chafed wires may lead to arcing, local overheating and AC generator failure. The AC generators provide power to the anti-icing heaters, including pitot/static heater, engine adapter heater, and propeller heater. Failure of both AC generators would result in the loss of these systems and poses a safety concern.
>
> Investigation has revealed that at four wiring harness tie down mount locations, the blind fasteners used to attach the tie down mount base were found to have protruding stems which chafed through the wire insulation leading to arcing damage. In addition, the wire chafing along the wing rear spar lower shroud has been attributed to sagging wire bundles resting on the structure and insufficient support in low clearance areas.
>
> This directive mandates the replacement of the blind fasteners with solid rivets, and to inspect for and rectify damaged wiring along the wing lower shroud.

Loss of both AC generators could lead to unannunciated loss of heat to both engine inlets, which could lead to loss of power in both engines during icing conditions. The required actions also include a detailed inspection for damage and chafing of the wires in the wiring harness installation, and the Teflon tubing if necessary. The corrective actions (rectifying) include replacement or repair of the chafed or damaged wire or Teflon tubing. You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Bombardier has issued Alert Service Bulletin A84–24–44, Revision A, dated February 2, 2010; and Repair Drawing 8/4–24–011, Issue 2, dated January 21, 2010. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all pertinent information and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

Differences Between the AD and the MCAI or Service Information

We have reviewed the MCAI and related service information and, in general, agree with their substance. But we might have found it necessary to use different words from those in the MCAI to ensure the AD is clear for U.S. operators and is enforceable. In making these changes, we do not intend to differ substantively from the information provided in the MCAI and related service information.

We might also have required different actions in this AD from those in the MCAI in order to follow FAA policies. Any such differences are highlighted in a Note within the AD.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because the chafing of a wire bundle could result in an electrical short and potential loss of several functions essential for safe flight, including both AC generators. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include "Docket No. FAA–2010–0435; Directorate Identifier 2010–NM–084–AD" at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. We will also post a report summarizing each substantive verbal contact we receive about this AD.

Authority for This Rulemaking

Title 49 of the United States Code specifies the FAA's authority to issue rules on aviation safety. Subtitle I, section 106, describes the authority of the FAA Administrator. "Subtitle VII: Aviation Programs," describes in more detail the scope of the Agency's authority.

We are issuing this rulemaking under the authority described in "Subtitle VII, Part A, Subpart III, Section 44701: General requirements." Under that section, Congress charges the FAA with promoting safe flight of civil aircraft in air commerce by prescribing regulations for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. This regulation is within the scope of that authority because it addresses an unsafe condition that is likely to exist or develop on products identified in this rulemaking action.

Regulatory Findings

We determined that this AD will not have federalism implications under Executive Order 13132. This AD will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

For the reasons discussed above, I certify this AD:

1. Is not a "significant regulatory action" under Executive Order 12866;

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and

3. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

We prepared a regulatory evaluation of the estimated costs to comply with this AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment

■ Accordingly, under the authority delegated to me by the Administrator, the FAA amends 14 CFR part 39 as follows:

PART 39—AIRWORTHINESS DIRECTIVES

■ 1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2010–10–04 Bombardier, Inc.: Amendment 39–16283. Docket No. FAA–2010–0435; Directorate Identifier 2010–NM–084–AD.

Effective Date

(a) This airworthiness directive (AD) becomes effective May 20, 2010.

Affected ADs

(b) None.

Applicability

(c) This AD applies to Bombardier, Inc. Model DHC–8–400, –401, and –402 airplanes, serial numbers 4001 through 4169 inclusive, certificated in any category.

Subject

(d) Air Transport Association (ATA) of America Code 24: Electrical Power.

Reason

(e) The mandatory continued airworthiness information (MCAI) states:

Operators of DHC–8 400 Series aeroplanes have been reporting chafing of wires in the AC wire harnesses located along the lower wing shroud on either wing resulting in a loss of various system services. Chafed wires may lead to arcing, local overheating and AC generator failure. The AC generators provide power to the anti-icing heaters, including pitot/static heater, engine adapter heater, and propeller heater. Failure of both AC generators would result in the loss of these systems and poses a safety concern.

Investigation has revealed that at four wiring harness tie down mount locations, the blind fasteners used to attach the tie down mount base were found to have protruding stems which chafed through the wire insulation leading to arcing damage. In addition, the wire chafing along the wing rear spar lower shroud has been attributed to sagging wire bundles resting on the structure and insufficient support in low clearance areas.

This directive mandates the replacement of the blind fasteners with solid rivets, and to inspect for and rectify damaged wiring along the wing lower shroud.

Loss of both AC generators could lead to unannunciated loss of heat to both engine inlets, which could lead to loss of power in both engines during icing conditions. The required actions also include a detailed inspection for damage and chafing of the wires in the wiring harness installation, and the Teflon tubing if necessary. The corrective actions (rectifying) include replacement or repair of the chafed or damaged wire or Teflon tubing.

Compliance

(f) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Replacement of Blind Fasteners, Inspection for Chafing at Four Wiring Harness Tie Down Mount Locations and Corrective Action

(g) Within 200 flight hours after the effective date of this AD: Replace the blind fasteners installed at the four wiring harness tie down mount locations with solid rivets; and do a detailed inspection for chafing and damage of the wires and, as applicable, of any Teflon tubing and do all applicable corrective actions; in accordance with paragraph B.(6) of the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–24–44, Revision A, dated February 2, 2010. Do all applicable corrective actions before further flight.

Inspection of AC Feeder Cables Along Lower Wing Shroud and Corrective Action

(h) At the applicable time in paragraph (h)(1) or (h)(2) of this AD: Do a detailed inspection of the wiring harness installation along the wing rear spar lower shroud for any chafing and damage, and do all applicable corrective actions, in accordance with the Accomplishment Instructions of Bombardier Alert Service Bulletin A84–24–44, Revision A, dated February 2, 2010. Do all applicable corrective actions before further flight.

(1) For airplanes with AC feeder cables not covered with protective Teflon tubing (Modsum Number IS4Q2450001 or production Modsum 4Q109946 not incorporated): Within 600 flight hours after the effective date of this AD.

(2) For airplanes with AC feeder cables covered with protective Teflon tubing (Modsum Number IS4Q2450001 or production Modsum 4Q109946 incorporated): Within 4,000 flight hours after the effective date of this AD.

(i) For airplanes on which the temporary repair specified in Bombardier Repair Drawing 8/4–24–011, Issue 2, dated January 21, 2010, has been done: Within 600 flight hours after accomplishing the temporary repair or 60 flight hours after the effective date of this AD, whichever occurs later, do the permanent repair or replace the wiring, in accordance with Bombardier Repair Drawing 8/4–24–011, Issue 2, dated January 21, 2010.

Actions According to Previous Issue of Service Information

(j) Actions done before the effective date of this AD in accordance with Bombardier Alert Service Bulletin A84–24–44, dated January 27, 2010, are acceptable for compliance with the corresponding requirements of paragraphs (g) and (h) of this AD.

(k) Actions done before the effective date of this AD in accordance with any modification summary identified in Table 1 of this AD are acceptable for compliance with the corresponding requirements of paragraph (g) of this AD.

TABLE 1—MODIFICATION SUMMARIES

Bombardier modification summary—	Revision—	Dated—
IS4Q5700013	A	January 12, 2010.
IS4Q5700013	B	January 20, 2010.
IS4Q5700013	C	January 27, 2010.

Reporting Requirement

(l) Submit a report of the findings (both positive and negative) of the inspection required by paragraph (h) of this AD to Bombardier Technical Help Desk; telephone 416–375–4000; e-mail *thd.qseries@aero.bombardier.com;* at the applicable time specified in paragraph (l)(1) or (l)(2) of this AD. Use Figures 1 and 2 (Feedback Form) of Bombardier Alert Service Bulletin A84–24–44, Revision A, dated February 2, 2010, to submit the report. The report must include the inspection results, a description of any discrepancies found, the airplane serial number, and the number of landings and flight hours on the airplane.

(1) If the inspection was done on or after the effective date of this AD: Submit the report within 14 days after the inspection.

(2) If the inspection was accomplished prior to the effective date of this AD: Submit the report within 14 days after the effective date of this AD.

FAA AD Differences

Note 1: This AD differs from the MCAI and/or service information as follows: The MCAI does not specify a compliance time for doing a permanent repair or replacement for airplanes on which a temporary repair is done. This AD requires that the temporary repair is replaced by a permanent repair or replacement of the wiring. We have coordinated this difference with Transport Canada Civil Aviation (TCCA).

Other FAA AD Provisions

(m) The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, ANE–170, New York Aircraft Certification Office, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14

CFR 39.19. Send information to *Attn:* Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, New York, 11590; telephone 516–228–7300; fax 516–794–5531. Before using any approved AMOC on any airplane to which the AMOC applies, notify your principal maintenance inspector (PMI) or principal avionics inspector (PAI), as appropriate, or lacking a principal inspector, your local Flight Standards District Office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) *Reporting Requirements:* For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(n) Refer to MCAI Canadian Airworthiness Directive CF–2010–08, dated March 16, 2010; Bombardier Alert Service Bulletin A84–24–44, Revision A, dated February 2, 2010; and Bombardier Repair Drawing 8/4–24–011, Issue 2, dated January 21, 2010; for related information.

Material Incorporated by Reference

(o) You must use Bombardier Alert Service Bulletin A84–24–44, Revision A, dated February 2, 2010; and Bombardier Repair Drawing 8/4–24–011, Issue 2, dated January 21, 2010; as applicable; to do the actions required by this AD, unless the AD specifies otherwise. Bombardier Repair Drawing 8/4–24–011, Issue 2, dated January 21, 2010, contains the following effective pages:

Page No.	Revision level shown on page	Date shown on page
1, 3	2	January 21, 2010.*
2, 4–7	1	January 18, 2010.*

* Only the first page of this repair drawing contains the issue dates.

(1) The Director of the Federal Register approved the incorporation by reference of this service information under 5 U.S.C. 552(a) and 1 CFR part 51.

(2) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; e-mail *thd.qseries@aero.bombardier.com;* Internet *http://www.bombardier.com.*

(3) You may review copies of the service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

(4) You may also review copies of the service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

Issued in Renton, Washington, on April 27, 2010.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2010–10472 Filed 5–4–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 1b and 157

[Docket No. RM10–21–000; Order No. 734]

Transferring Certain Enforcement Hotline Matters to the Dispute Resolution Service: Correction

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final Rule: correction.

SUMMARY: The Federal Energy Regulatory Commission is correcting a final rule that appeared in the **Federal Register** of April 26, 2010, 75 FR 21503.

The document transferred certain enforcement hotline matters to the Commission's Dispute Resolution Service. This document corrects various Part references on the first page of the rule and in the amendatory language.

DATES: Effective May 1, 2010.

FOR FURTHER INFORMATION CONTACT: Stuart Fischer, Office of Enforcement, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8517.

Nils Nichols, Office of Administrative Litigation/Dispute Resolution Service, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502–8638.

SUPPLEMENTARY INFORMATION: In FR Document 2010–9125, published April 26, 2010 (75 FR 21403), make the following corrections:

1. On page 21503, column 2, the part heading is corrected to read: "18 CFR Parts 1b and 157".

2. On page 21505, column 2, the words of issuance are corrected to read as follows:

"In consideration of the foregoing, the Commission amends parts 1b and 157, Chapter 1, Title 18, Code of Federal Regulations, to read as follows:"

3. On page 21505, column 3, amendatory instruction 1 is corrected to read as follows:

"1. The authority citation for part 157 continues to read as follows:"

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–10453 Filed 5–4–10; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Part 101

[CBP Dec. 10—05; USCBP–2009–0035]

RIN 1651–AA79

Further Consolidation of CBP Drawback Centers

AGENCY: Customs and Border Protection, DHS.

ACTION: Final rule.

SUMMARY: This document adopts as a final rule the proposal to amend title 19 of the Code of Federal Regulations to reflect the closure of the Customs and Border Protection ("CBP") Drawback Center located at the Port of Los Angeles-Long Beach, California. The closure of this Drawback Center is necessary because of decreases in claim

filings and drawback claim values at the Los Angeles Drawback Center and is part of CBP's planned consolidation of its drawback program.

DATES: *Effective Date:* This rule is effective June 4, 2010.

FOR FURTHER INFORMATION CONTACT: Christine Kegley, Import Operations Branch, Office of Field Operations, Customs and Border Protection, (202) 344–2319.

SUPPLEMENTARY INFORMATION:

Background

On December 1, 2009, Customs and Border Protection ("CBP") published in the **Federal Register** (74 FR 62715) a proposed amendment to the CBP regulations to reflect the proposed closing of the Los Angeles Drawback Center as part of the agency's planned consolidation of its drawback program. The document requested public comment regarding the proposed action. In that document, CBP noted that because of the decrease in the number of drawback claims filed and processed at the Los Angeles Drawback Center since 2003 and the small number of claims filed overall in the Los Angeles center, CBP proposed to close this drawback center, thus leaving four centers located in its key geographical areas of Chicago, Houston, New York, and San Francisco. CBP believes that closing the Los Angeles Drawback Center is required in order to attain CBP's original goals of conserving resources, increasing efficiency, exercising fiscal responsibility, and promoting greater uniformity in the processing of drawback claims. In accordance with 19 U.S.C. 2075(g)(2)(C), the Homeland Security Act of 2002 (6 U.S.C. 217(b)(2)), and the SAFE Port Act of 2006 (6 U.S.C. 115(D)), CBP notified the House Committee on Ways & Means, the Senate Committee on Finance, and House Committee on Homeland Security of its intent to close the Los Angeles Drawback Center. The Congressional notification period expired and CBP did not receive from Congress any objections to the proposed closing of the Los Angeles Drawback Center.

The document also stated that any future claims will be required to be sent to one of the four remaining drawback centers located in Chicago, Houston, New York, or San Francisco. All remaining claims that were filed at the Los Angeles Drawback Center prior to closure that have not been liquidated and still require CBP review will be forwarded to the San Francisco Drawback Center for final processing.

Discussion of Comments

One comment was received in response to the solicitation of public comment in the proposed rule. A description of the comment received, together with CBP's analysis, is set forth below.

Comment: A commenter expressed concern about the proper staffing levels at the San Francisco Drawback Center to accommodate the additional drawback claim filings it will receive due to the closure of the Los Angeles Drawback Center.

CBP Response: CBP concurs that staffing at the drawback centers is very important. CBP is mandated by the Homeland Security Act of 2002 to maintain a minimum staffing number for drawback specialists. Two drawback specialist positions that were allotted to the Los Angeles Drawback Center have been reassigned to the San Francisco Drawback Center to address the anticipated increase in workload. CBP will continually monitor drawback specialist staffing levels so that each of the CBP Drawback Centers is appropriately staffed.

Conclusion

After analysis of the comment and further review of the matter, CBP has determined to adopt as a final rule the amendment proposed in the Notice of Proposed Rulemaking published in the **Federal Register** (74 FR 62715) on December 1, 2009.

Executive Order 12866

This final rule does not meet the criteria to be considered an economically "significant regulatory action" under Executive Order 12866 because it will not result in the expenditure of over $100 million in any one year. The Office of Management and Budget (OMB) has not reviewed this rule under that Order.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires federal agencies to examine the impact a rule would have on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

In the proposed rule, CBP stated that the amendment would not likely have a significant economic impact on a substantial number of small entities. CBP solicited public input, and did not receive any comments challenging that finding. We certify, therefore, that this rule will not have a significant economic impact on a substantial number of small entities.

Signing Authority

This document is being issued in accordance with 19 CFR 0.2(a), which provides that the authority of the Secretary of the Treasury with respect to CBP regulations that are not related to customs revenue functions was transferred to the Secretary of Homeland Security pursuant to Section 403(l) of the Homeland Security Act of 2002. Accordingly, this final rule to amend such regulations may be signed by the Secretary of Homeland Security (or her delegate).

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Customs ports of entry.

Amendment to the Regulations

■ For the reasons set forth above, part 101 of the title 19 of the Code of Federal Regulations (19 CFR part 101) is amended as follows:

PART 101—GENERAL PROVISIONS

■ 1. The general authority citation for part 101 continues to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1623, 1624, 1646a.

Section 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b.

* * * * *

§ 101.3 [Amended]

■ 2. In § 101.3, the table in paragraph (b)(1) is amended by removing the plus sign in the "Ports of entry" column before the column listing for "Los Angeles-Long Beach" under the state of California.

Dated: April 28, 2010.

Alan Bersin,

Commissioner, U.S. Customs and Border Protection.

[FR Doc. 2010–10506 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 556 and 558

[Docket No. FDA–2010–N–0002]

Animal Drugs, Feeds, and Related Products; Withdrawal of Approval of a New Animal Drug Application; Buquinolate; Coumaphos

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the animal drug regulations by removing those portions that reflect approval of two new animal drug applications (NADAs). In a notice published elsewhere in this issue of the **Federal Register**, FDA is withdrawing approval of these NADAs.

DATES: This rule is effective May 17, 2010.

FOR FURTHER INFORMATION CONTACT: John Bartkowiak, Center for Veterinary Medicine (HFV–212), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9079, e-mail: *john.bartkowiak@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Purina Mills, Inc., P.O. Box 66812, St. Louis, MO 63166–6812 has requested that FDA withdraw approval of NADA 42–117 for Purina 6 Day Worm-Kill Concentrate (coumaphos) because the product is no longer manufactured or marketed.

In addition, Pharmacia & Upjohn Co., a Division of Pfizer, Inc., 235 East 42d St., New York, NY 10017 has requested that FDA withdraw approval of NADA 45–738 for use of LINCOMIX (lincomycin) and BONAID (buquinolate) single-ingredient Type A medicated articles to make two-way, combination drug Type C medicated broiler feed because buquinolate is no longer manufactured or marketed.

In a notice published elsewhere in this issue of the **Federal Register**, FDA gave notice that approval of NADA 42–117 and NADA 45–738, and all supplements and amendments thereto, is withdrawn, effective May 17, 2010. As provided in the regulatory text of this document, the animal drug regulations are amended to reflect these withdrawals of approval.

In 1995, the approval of NADA 34 716 for BONAID Type A medicated article was voluntarily withdrawn (60 FR 37651, July 21, 1995) and approved conditions of use for buquinolate and all its approved combinations in 21 CFR 558.105, including combination with lincomycin under NADA 45–738, were removed (60 FR 39847, July 21, 1995). At this time, the tolerances for residues of buquinolate in edible products of chickens and its listing as a Category I drug in 21 CFR 558.4 are being removed.

This rule does not meet the definition of "rule" in 5 U.S.C. 804(3)(A) because it is a rule of "particular applicability." Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects

21 CFR Part 556

Animal drugs, Foods.

21 CFR Part 558

Animal drugs, Animal feeds.

■ Therefore, under the Federal Food, Drug, and Cosmetic Act and under the authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 556 and 558 are amended as follows:

PART 556—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

■ 1. The authority citation for 21 CFR part 556 continues to read as follows:

Authority: 21 U.S.C. 342, 360b, 371.

§ 556.90 [Removed]

■ 2. Remove § 556.90.

PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

■ 3. The authority citation for 21 CFR part 558 continues to read as follows:

Authority: 21 U.S.C. 360b, 371.

§ 558.4 [Amended]

■ 4. In § 558.4, in paragraph (d), in the "Category I" table, remove the entry for "Buquinolate".

§ 558.185 [Amended]

■ 5. In § 558.185, remove paragraph (b)(2) and redesignate paragraph (b)(3) as paragraph (b)(2).

Dated: April 30, 2010.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. 2010–10564 Filed 5–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

31 CFR Part 551

Somalia Sanctions Regulations

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Final Rule.

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control ("OFAC") is issuing regulations with respect to Somalia to implement Executive Order 13536 of April 12, 2010. OFAC intends to supplement this part 551 with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance and additional general licenses and statements of licensing policy.

DATES: *Effective Date:* May 5, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director for Compliance, Outreach & Implementation, *tel.:* 202/622–2490, Assistant Director for Licensing, *tel.:* 202/622–2480, Assistant Director for Policy, *tel.:* 202/622–4855, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), *tel.:* 202/622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*http://www.treas.gov/ofac*). Certain general information pertaining to OFAC's sanctions programs also is available via facsimile through a 24-hour fax-on-demand service, *tel.:* 202/622–0077.

Background

On April 12, 2010, the President, invoking the authority of, *inter alia,* the International Emergency Economic Powers Act (50 U.S.C. 1701–1706), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 5 of the United Nations Participation Act (22 U.S.C. 287c), issued Executive Order 13536 (75 FR 19869, April 15, 2010) ("E.O. 13536"), effective at 12:01 a.m. eastern daylight time on April 13, 2010.

The Department of the Treasury's Office of Foreign Assets Control is issuing the Somalia Sanctions Regulations, 31 CFR part 551 (the "Regulations"), to implement E.O. 13536, pursuant to authorities delegated to the Secretary of the Treasury in E.O.

13536. A copy of E.O. 13536 appears in appendix A to this part.

The Regulations are being published in abbreviated form at this time for the purpose of providing immediate guidance to the public. OFAC intends to supplement this part 551 with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance and additional general licenses and statements of licensing policy. (The appendix to the Regulations will be removed when OFAC supplements this part with a more comprehensive set of regulations.)

Public Participation

Because the Regulations involve a foreign affairs function, the provisions of Executive Order 12866 and the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date are inapplicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act (5 U.S.C. 601–612) does not apply.

Paperwork Reduction Act

The collections of information related to the Regulations are contained in 31 CFR part 501 (the "Reporting, Procedures and Penalties Regulations"). Pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), those collections of information have been approved by the Office of Management and Budget under control number 1505–0164. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

List of Subjects in 31 CFR Part 551

Administrative practice and procedure, Banks, Banking, Blocking of assets, Credit, Services, Somalia.

■ For the reasons set forth in the preamble, the Department of the Treasury's Office of Foreign Assets Control adds part 551 to 31 CFR Chapter V to read as follows:

PART 551—SOMALIA SANCTIONS REGULATIONS

Subpart A—Relation of This Part to Other Laws and Regulations

Sec.

Subpart B—Prohibitions

Subpart C—General Definitions

Subpart D—Interpretations

Subpart E—Licenses, Authorizations, and Statements of Licensing Policy

Subpart F—[Reserved]

Subpart G—[Reserved]

Subpart H—Procedures

Subpart I—Paperwork Reduction Act

Authority: 3 U.S.C. 301; 31 U.S.C. 321(b); 50 U.S.C. 1601–1651, 1701–1706; 22 U.S.C. 287c; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 110–96, 121 Stat. 1011; E.O. 13536, 75 FR 19869, April 15, 2010.

Subpart A—Relation of This Part to Other Laws and Regulations

§ 551.101 Relation of this part to other laws and regulations.

This part is separate from, and independent of, the other parts of this chapter, with the exception of part 501 of this chapter, the recordkeeping and reporting requirements and license application and other procedures of which apply to this part. Actions taken pursuant to part 501 of this chapter with respect to the prohibitions contained in this part are considered actions taken pursuant to this part. Differing foreign policy and national security circumstances may result in differing interpretations of similar language among the parts of this chapter. No license or authorization contained in or issued pursuant to those other parts authorizes any transaction prohibited by this part. No license or authorization contained in or issued pursuant to any other provision of law or regulation authorizes any transaction prohibited by this part. No license or authorization contained in or issued pursuant to this part relieves the involved parties from complying with any other applicable laws or regulations.

Note to § 551.101: This part has been published in abbreviated form for the purpose of providing immediate guidance to the public. OFAC intends to supplement this part with a more comprehensive set of regulations, which may include additional interpretive and definitional guidance and additional general licenses and statements of licensing policy.

Subpart B—Prohibitions

§ 551.201 Prohibited transactions.

All transactions prohibited pursuant to Executive Order 13536 are also prohibited pursuant to this part.

Note 1 to § 551.201: The names of persons listed in or designated pursuant to Executive Order 13536, whose property and interests in property are blocked pursuant to this section, are published on the Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List ("SDN" list) (which is accessible via the Office of Foreign Assets Control's Web site), published in the **Federal Register,** and incorporated into Appendix A to this chapter with the identifier "[SOMALIA]." *See* § 551.406 concerning entities that may not be listed on the SDN list but whose property and interests in property are nevertheless blocked pursuant to this section.

Note 2 to § 551.201: Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) ("IEEPA") explicitly authorizes the blocking of property and interests in property of a person during the pendency of an investigation. The names of persons whose property and interests in property are blocked pending investigation pursuant to this part also are published on the SDN list, published in the **Federal Register,** and incorporated into Appendix A to this chapter with the identifier "[BPI–SOMALIA]."

Note 3 to § 551.201: Sections 501.806 and 501.807 of this chapter describe the procedures to be followed by persons seeking, respectively, the unblocking of funds that they believe were blocked due to mistaken identity, or administrative reconsideration of their status as persons whose property and interests in property are blocked pursuant to this section.

§ 551.202 Effect of transfers violating the provisions of this part.

(a) Any transfer after the effective date that is in violation of any provision of this part or of any regulation, order, directive, ruling, instruction, or license issued pursuant to this part, and that involves any property or interest in property blocked pursuant to § 551.201, is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power, or privilege with respect to such property or property interests.

(b) No transfer before the effective date shall be the basis for the assertion or recognition of any right, remedy, power, or privilege with respect to, or any interest in, any property or interest in property blocked pursuant to § 551.201, unless the person who holds or maintains such property, prior to that date, had written notice of the transfer or by any written evidence had recognized such transfer.

(c) Unless otherwise provided, an appropriate license or other authorization issued by the Office of Foreign Assets Control before, during, or after a transfer shall validate such transfer or make it enforceable to the same extent that it would be valid or enforceable but for the provisions of IEEPA, Executive Order 13536, this part, and any regulation, order, directive, ruling, instruction, or license issued pursuant to this part.

(d) Transfers of property that otherwise would be null and void or unenforceable by virtue of the provisions of this section shall not be deemed to be null and void or unenforceable as to any person with whom such property is or was held or maintained (and as to such person only) in cases in which such person is able to establish to the satisfaction of the Office of Foreign Assets Control each of the following paragraphs (d)(1) through (3):

(1) Such transfer did not represent a willful violation of the provisions of this part by the person with whom such property is or was held or maintained (and as to such person only);

(2) The person with whom such property is or was held or maintained did not have reasonable cause to know or suspect, in view of all the facts and circumstances known or available to such person, that such transfer required a license or authorization issued pursuant to this part and was not so licensed or authorized, or, if a license or authorization did purport to cover the transfer, that such license or authorization had been obtained by misrepresentation of a third party or withholding of material facts or was otherwise fraudulently obtained; and

(3) The person with whom such property is or was held or maintained filed with the Office of Foreign Assets Control a report setting forth in full the circumstances relating to such transfer promptly upon discovery that:

(i) Such transfer was in violation of the provisions of this part or any regulation, ruling, instruction, license, or other directive or authorization issued pursuant to this part;

(ii) Such transfer was not licensed or authorized by the Office of Foreign Assets Control; or

(iii) If a license did purport to cover the transfer, such license had been obtained by misrepresentation of a third party or withholding of material facts or was otherwise fraudulently obtained.

Note to paragraph (d) of § 551.202: The filing of a report in accordance with the provisions of paragraph (d)(3) of this section shall not be deemed evidence that the terms of paragraphs (d)(1) and (d)(2) of this section have been satisfied.

(e) Unless licensed pursuant to this part, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which, on or since the effective date, there existed an interest of a person whose property and interests in property are blocked pursuant to § 551.201.

§ 551.203 Holding of funds in interest-bearing accounts; investment and reinvestment.

(a) Except as provided in paragraphs (c) or (d) of this section, or as otherwise directed by the Office of Foreign Assets Control, any U.S. person holding funds, such as currency, bank deposits, or liquidated financial obligations, subject to § 551.201 shall hold or place such funds in a blocked interest-bearing account located in the United States.

(b)(1) For purposes of this section, the term *blocked interest-bearing account* means a blocked account:

(i) In a federally-insured U.S. bank, thrift institution, or credit union, provided the funds are earning interest at rates that are commercially reasonable; or

(ii) With a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), provided the funds are invested in a money market fund or in U.S. Treasury bills.

(2) For purposes of this section, a rate is commercially reasonable if it is the rate currently offered to other depositors on deposits or instruments of comparable size and maturity.

(3) Funds held or placed in a blocked account pursuant to this paragraph (b) may not be invested in instruments the maturity of which exceeds 180 days. If interest is credited to a separate blocked account or subaccount, the name of the account party on each account must be the same.

(c) Blocked funds held in instruments the maturity of which exceeds 180 days at the time the funds become subject to § 551.201 may continue to be held until maturity in the original instrument, provided any interest, earnings, or other proceeds derived therefrom are paid into a blocked interest-bearing account in accordance with paragraphs (b) or (d) of this section.

(d) Blocked funds held in accounts or instruments outside the United States at the time the funds become subject to § 551.201 may continue to be held in the same type of accounts or instruments, provided the funds earn interest at rates that are commercially reasonable.

(e) This section does not create an affirmative obligation for the holder of blocked tangible property, such as chattels or real estate, or of other blocked property, such as debt or equity securities, to sell or liquidate such property. However, the Office of Foreign Assets Control may issue licenses permitting or directing such sales or liquidation in appropriate cases.

(f) Funds subject to this section may not be held, invested, or reinvested in a manner that provides immediate financial or economic benefit or access to any person whose property and interests in property are blocked pursuant to § 551.201, nor may their holder cooperate in or facilitate the pledging or other attempted use as collateral of blocked funds or other assets.

Subpart C—General Definitions

§ 551.301 Blocked account; blocked property.

The terms *blocked account* and *blocked property* shall mean any account or property subject to the prohibitions in § 551.201 held in the name of a person whose property and interests in property are blocked pursuant to § 551.201, or in which such person has an interest, and with respect to which payments, transfers, exportations, withdrawals, or other dealings may not be made or effected except pursuant to an authorization or license from the Office of Foreign Assets Control expressly authorizing such action.

Note to § 551.301: *See* § 551.406 concerning the blocked status of property and interests in property of an entity that is 50 percent or more owned by a person whose property and interests in property are blocked pursuant to § 551.201.

§ 551.302 Effective date.

The term *effective date* refers to the effective date of the applicable prohibitions and directives contained in this part as follows:

(a) With respect to a person listed in the Annex to E.O. 13536, 12:01 a.m. eastern daylight time, April 13, 2010; or

(b) With respect to a person whose property and interests in property are otherwise blocked pursuant to E.O. 13536, the earlier of the date of actual or constructive notice that such person's property and interests in property are blocked.

§ 551.303 Entity.

The term *entity* means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization.

§ 551.304 Interest.

Except as otherwise provided in this part, the term *interest,* when used with respect to property (*e.g.,* "an interest in property"), means an interest of any nature whatsoever, direct or indirect.

§ 551.305 Licenses; general and specific.

(a) Except as otherwise specified, the term *license* means any license or authorization contained in or issued pursuant to this part.

(b) The term *general license* means any license or authorization the terms of which are set forth in subpart E of this part.

(c) The term *specific license* means any license or authorization not set forth in subpart E of this part but issued pursuant to this part.

Note to § 551.305: *See* § 501.801 of this chapter on licensing procedures.

§ 551.306 Person.

The term *person* means an individual or entity.

§ 551.307 Property; property interest.

The terms *property* and *property interest* include, but are not limited to, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, guarantees, debentures, stocks, bonds, coupons, any other financial instruments, bankers acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, letters of credit and any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent.

§ 551.308 Transfer.

The term *transfer* means any actual or purported act or transaction, whether or not evidenced by writing, and whether or not done or performed within the United States, the purpose, intent, or effect of which is to create, surrender, release, convey, transfer, or alter, directly or indirectly, any right, remedy, power, privilege, or interest with respect to any property. Without limitation on the foregoing, it shall include the making, execution, or delivery of any assignment, power, conveyance, check, declaration, deed, deed of trust, power of attorney, power of appointment, bill of sale, mortgage, receipt, agreement, contract, certificate, gift, sale, affidavit, or statement; the making of any payment; the setting off of any obligation or credit; the appointment of any agent, trustee, or fiduciary; the creation or transfer of any lien; the issuance, docketing, filing, or levy of or under any judgment, decree, attachment, injunction, execution, or other judicial or administrative process or order, or the service of any garnishment; the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country; the fulfillment of any condition; the exercise of any power of appointment, power of attorney, or other power; or the acquisition, disposition, transportation, importation, exportation, or withdrawal of any security.

§ 551.309 United States.

The term *United States* means the United States, its territories and possessions, and all areas under the jurisdiction or authority thereof.

§ 551.310 U.S. financial institution.

The term *U.S. financial institution* means any U.S. entity (including its foreign branches) that is engaged in the business of accepting deposits, making, granting, transferring, holding, or brokering loans or credits, or purchasing or selling foreign exchange, securities, commodity futures or options, or procuring purchasers and sellers thereof, as principal or agent. It includes but is not limited to depository institutions, banks, savings banks, trust companies, securities brokers and dealers, commodity futures and options brokers and dealers, forward contract and foreign exchange merchants, securities and commodities exchanges, clearing corporations, investment companies, employee benefit plans, and U.S. holding companies, U.S. affiliates, or U.S. subsidiaries of any of the foregoing. This term includes those branches, offices and agencies of foreign financial institutions that are located in the United States, but not such institutions' foreign branches, offices, or agencies.

§ 551.311 United States person; U.S. person.

The term *United States person* or *U.S. person* means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.

Subpart D—Interpretations

§ 551.401 [Reserved]

§ 551.402 Effect of amendment.

Unless otherwise specifically provided, any amendment, modification, or revocation of any provision in this part, any provision in or appendix to this chapter, or any order, regulation, ruling, instruction, or license issued by the Office of Foreign Assets Control does not affect any act done or omitted, or any civil or criminal proceeding commenced or pending, prior to such amendment, modification, or revocation. All penalties, forfeitures, and liabilities under any such order, regulation, ruling, instruction, or license continue and may be enforced as if such amendment, modification, or revocation had not been made.

§ 551.403 Termination and acquisition of an interest in blocked property.

(a) Whenever a transaction licensed or authorized by or pursuant to this part results in the transfer of property (including any property interest) away from a person, such property shall no longer be deemed to be property blocked pursuant to § 551.201, unless there exists in the property another interest that is blocked pursuant to § 551.201 or any other part of this chapter, the transfer of which has not been effected pursuant to license or other authorization.

(b) Unless otherwise specifically provided in a license or authorization issued pursuant to this part, if property (including any property interest) is transferred or attempted to be transferred to a person whose property and interests in property are blocked pursuant to § 551.201, such property shall be deemed to be property in which that person has an interest and therefore blocked.

§ 551.404 Transactions ordinarily incident to a licensed transaction authorized.

Any transaction ordinarily incident to a licensed transaction and necessary to give effect thereto is also authorized, except:

(a) An ordinarily incident transaction, not explicitly authorized within the terms of the license, by or with a person whose property and interests in property are blocked pursuant to § 551.201; or

(b) An ordinarily incident transaction, not explicitly authorized within the terms of the license, involving a debit to a blocked account or a transfer of blocked property.

§ 551.405 Setoffs prohibited.

A setoff against blocked property (including a blocked account), whether by a U.S. bank or other U.S. person, is a prohibited transfer under § 551.201 if effected after the effective date.

§ 551.406 Entities owned by a person whose property and interests in property are blocked.

A person whose property and interests in property are blocked pursuant to § 551.201 has an interest in all property and interests in property of an entity in which it owns, directly or indirectly, a 50 percent or greater interest. The property and interests in property of such an entity, therefore, are blocked, and such an entity is a person whose property and interests in property are blocked pursuant to § 551.201, regardless of whether the entity itself is listed in the Annex or designated pursuant to Executive Order 13536.

Subpart E—Licenses, Authorizations, and Statements of Licensing Policy

§ 551.501 [Reserved]

§ 551.502 [Reserved]

§ 551.503 Exclusion from licenses.

The Office of Foreign Assets Control reserves the right to exclude any person, property, or transaction from the operation of any license or from the privileges conferred by any license. The Office of Foreign Assets Control also reserves the right to restrict the applicability of any license to particular persons, property, transactions, or classes thereof. Such actions are binding upon actual or constructive notice of the exclusions or restrictions.

§ 551.504 Payments and transfers to blocked accounts in U.S. financial institutions.

Any payment of funds or transfer of credit in which a person whose property and interests in property are blocked pursuant to § 551.201 has any interest that comes within the possession or control of a U.S. financial institution must be blocked in an account on the books of that financial institution. A transfer of funds or credit by a U.S. financial institution between blocked accounts in its branches or offices is authorized, provided that no transfer is made from an account within the United States to an account held outside the United States, and further provided that a transfer from a blocked account may be made only to another blocked account held in the same name.

Note to § 551.504: *See* § 501.603 of this chapter for mandatory reporting requirements regarding financial transfers. See also § 551.203 concerning the obligation to hold blocked funds in interest-bearing accounts.

§ 551.505 Entries in certain accounts for normal service charges authorized.

(a) A U.S. financial institution is authorized to debit any blocked account held at that financial institution in payment or reimbursement for normal service charges owed it by the owner of that blocked account.

(b) As used in this section, the term *normal service charges* shall include charges in payment or reimbursement for interest due; cable, telegraph, internet, or telephone charges; postage costs; custody fees; small adjustment charges to correct bookkeeping errors; and, but not by way of limitation, minimum balance charges, notary and protest fees, and charges for reference books, photocopies, credit reports, transcripts of statements, registered mail, insurance, stationery and supplies, and other similar items.

§ 551.506 Provision of certain legal services authorized.

(a) The provision of the following legal services to or on behalf of persons whose property and interests in property are blocked pursuant to § 551.201 is authorized, provided that all receipts of payment of professional fees and reimbursement of incurred expenses must be specifically licensed:

(1) Provision of legal advice and counseling on the requirements of and compliance with the laws of the United States or any jurisdiction within the United States, provided that such advice and counseling are not provided to facilitate transactions in violation of this part;

(2) Representation of persons named as defendants in or otherwise made parties to domestic U.S. legal, arbitration, or administrative proceedings;

(3) Initiation and conduct of domestic U.S. legal, arbitration, or administrative proceedings in defense of property interests subject to U.S. jurisdiction;

(4) Representation of persons before any federal or state agency with respect to the imposition, administration, or enforcement of U.S. sanctions against such persons; and

(5) Provision of legal services in any other context in which prevailing U.S. law requires access to legal counsel at public expense.

(b) The provision of any other legal services to persons whose property and interests in property are blocked pursuant to § 551.201, not otherwise authorized in this part, requires the issuance of a specific license.

(c) Entry into a settlement agreement or the enforcement of any lien, judgment, arbitral award, decree, or other order through execution, garnishment, or other judicial process purporting to transfer or otherwise alter or affect property or interests in property blocked pursuant to § 551.201 is prohibited unless licensed pursuant to this part.

§ 551.507 Authorization of emergency medical services.

The provision of nonscheduled emergency medical services in the United States to persons whose property and interests in property are blocked pursuant to § 551.201 is authorized, provided that all receipt of payment for such services must be specifically licensed.

Subpart F—[Reserved]

Subpart G—[Reserved]

Subpart H—Procedures

§ 551.801 [Reserved]

§ 551.802 Delegation by the Secretary of the Treasury.

Any action that the Secretary of the Treasury is authorized to take pursuant to Executive Order 13536 of April 12, 2010 (75 FR 19869, April 15, 2010), and any further Executive orders relating to the national emergency declared therein, may be taken by the Director of the Office of Foreign Assets Control or

by any other person to whom the Secretary of the Treasury has delegated authority so to act.

Subpart I—Paperwork Reduction Act

§ 551.901 Paperwork Reduction Act notice.

For approval by the Office of Management and Budget ("OMB") under the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) of information collections relating to recordkeeping and reporting requirements, licensing procedures (including those pursuant to statements of licensing policy), and other procedures, *see* § 501.901 of this chapter. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB.

APPENDIX A TO PART 551—EXECUTIVE ORDER 13536

Executive Order Blocking Property of Certain Persons Contributing to the Conflict In Somalia

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), section 5 of the United Nations Participation Act, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code,

I, BARACK OBAMA, President of the United States of America, find that the deterioration of the security situation and the persistence of violence in Somalia, and acts of piracy and armed robbery at sea off the coast of Somalia, which have repeatedly been the subject of United Nations Security Council resolutions (including Resolution 1844 of November 20, 2008; Resolution 1846 of December 2, 2008; Resolution 1851 of December 16, 2008; and Resolution 1897 of November 30, 2009), and violations of the arms embargo imposed by the United Nations Security Council in Resolution 733 of January 23, 1992, and elaborated upon and amended by subsequent resolutions (including Resolution 1356 of June 19, 2001; Resolution 1725 of December 6, 2006; Resolution 1744 of February 20, 2007; Resolution 1772 of August 20, 2007; Resolution 1816 of June 2, 2008; and Resolution 1872 of May 26, 2009), constitute an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any overseas branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(i) the persons listed in the Annex to this order; and

(ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(A) to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia, including but not limited to:

(1) acts that threaten the Djibouti Agreement of August 18, 2008, or the political process; or

(2) acts that threaten the Transitional Federal Institutions, the African Union Mission in Somalia (AMISOM), or other international peacekeeping operations related to Somalia;

(B) to have obstructed the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia;

(C) to have directly or indirectly supplied, sold, or transferred to Somalia, or to have been the recipient in the territory of Somalia of, arms or any related material, or any technical advice, training, or assistance, including financing and financial assistance, related to military activities;

(D) to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of, the activities described in subsections (a)(ii)(A), (a)(ii)(B), or (a)(ii)(C) of this section or any person whose property and interests in property are blocked pursuant to this order; or

(E) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.

(b) I hereby determine that, among other threats to the peace, security, or stability of Somalia, acts of piracy or armed robbery at sea off the coast of Somalia threaten the peace, security, or stability of Somalia.

(c) I hereby determine that, to the extent section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) may apply, the making of donations of the type of articles specified in such section by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to subsection (a) of this section would seriously impair my ability to deal with the national emergency declared in this order, and I hereby prohibit such donations as provided by subsection (a) of this section.

(d) The prohibitions in subsection (a) of this section include but are not limited to:

(i) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(ii) the receipt of any contribution or provision of funds, goods, or services from any such person.

(e) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order.

Sec. 2. (a) Any transaction by a United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 3. For the purposes of this order:

(a) the term "person" means an individual or entity;

(b) the term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) the term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any 5 jurisdiction within the United States (including foreign branches), or any person in the United States;

(d) the term "Transitional Federal Institutions" means the Transitional Federal Charter of the Somali Republic adopted in February 2004 and the Somali federal institutions established pursuant to such charter, and includes their agencies, instrumentalities, and controlled entities; and

(e) the term "African Union Mission in Somalia" means the mission authorized by the United Nations Security Council in Resolution 1744 of February 20, 2007, and reauthorized in subsequent resolutions, and includes its agencies, instrumentalities, and controlled entities.

Sec. 4. For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to section 1(a) of this order.

Sec. 5. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA and the UNPA, as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States Government consistent with applicable law. All 6 agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

Sec. 6. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to submit the recurring and final reports to the Congress on the national emergency declared in this order, consistent with section 401(c) of the NEA (50 U.S.C. 1641(c)) and section 204(c) of IEEPA (50 U.S.C. 1703(c)).

Sec. 7. The Secretary of the Treasury, in consultation with the Secretary of State, is

hereby authorized to determine that circumstances no longer warrant the blocking of the property and interests in property of a person listed in the Annex to this order, and to take necessary action to give effect to that determination.

Sec. 8. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 9. This order is effective at 12:01 a.m. eastern standard time on April 13, 2010.

Barack Obama,
THE WHITE HOUSE,
April 12, 2010.

ANNEX

Individuals

1. Abshir ABDILLAHI [born circa 1966]
2. Hassan Abdullah Hersi AL–TURKI [born circa 1944]
3. Hassan Dahir AWEYS [born 1935]
4. Ahmed Abdi AW–MOHAMED [born 10 July 1977]
5. Yasin Ali BAYNAH [born circa 1966]
6. Mohamed Abdi GARAAD [born circa 1973]
7. Yemane GHEBREAB [born 21 July 1951]
8. Fuad Mohamed KHALAF [born circa 1965]
9. Bashir Mohamed MAHAMOUD [born circa 1979–1982]
10. Fares Mohammed MANA'A [born 8 February 1965]
11. Mohamed SA'ID [born circa 1966]

Entity

1. al-Shabaab

Dated: April 19, 2010.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

Approved: April 22, 2010.

Stuart A. Levey,

Under Secretary, Office of Terrorism and Financial Intelligence, Department of the Treasury.

[FR Doc. 2010–9829 Filed 5–4–10; 8:45 am]

BILLING CODE 4811–45–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2010–0188]

National Maritime Week Tugboat Races, Seattle, WA

AGENCY: Coast Guard, DHS.

ACTION: Notice of enforcement of regulation.

SUMMARY: The Coast Guard will enforce the Special Local Regulation for the annual National Maritime Week Tugboat Races in Elliott Bay, WA on May 8, 2010. This action is necessary to ensure the safety of all participants and spectators from the inherent dangers associated with these types of races. During the enforcement period, no person or vessel may enter or remain in the regulated area except for participants in the event, supporting personnel, vessels registered with the event organizer, and personnel or vessels authorized by the Coast Guard Patrol Commander.

DATES: The regulations in 33 CFR 100.1306 will be enforced on May 8, 2010.

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice, call or e-mail Ensign Ashley M. Wanzer, Sector Seattle Waterways Management Division, Coast Guard; telephone 206–217–6175, e-mail *SectorSeattleWWM@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce the Special Local Regulation for the annual National Maritime Week Tugboat Races, Seattle, WA in 33 CFR 100.1306 on May 8, 2010. These regulations can be found in the April 17, 1996 issue of the **Federal Register** (70 FR 23938).

A regulated area is established on that portion of Elliott Bay along the Seattle waterfront in Puget Sound bounded by a line beginning at: 47°37′36″ N, 122°22′42″ W; thence to 47°37′24.5″ N, 122°22′58.5″ W; thence to 47°36′08″ N, 122°20′53″ W; thence to 47°36′21″ N, 122°20′31″ W; thence returning to the origin. This regulated area resembles a rectangle measuring approximately 3,900 yards along the shoreline between Pier 57 and Pier 89, and extending approximately 650 yards into Elliott Bay. Temporary floating markers will be placed by the race sponsors to delineate the regulated area. [Datum: NAD 1983]

No person or vessel may enter or remain in the regulated area except for participants in the event, supporting personnel, vessels registered with the event organizer, and personnel or vessels authorized by the Coast Guard Patrol Commander.

When deemed appropriate, the Coast Guard may establish a patrol consisting of active and auxiliary Coast Guard vessels and personnel in the regulated area described above. The patrol shall be under the direction of a Coast Guard officer or petty officer designated by the Captain of the Port as the Coast Guard Patrol Commander. The Patrol Commander may forbid and control the movement of vessels in this regulated area.

A succession of sharp, short blasts from whistle or horn from vessels patrolling the area under the direction of the Patrol Commander shall serve as a signal to stop. Vessels signaled shall stop and comply with the orders of the patrol vessel. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

The Coast Guard may be assisted by other Federal, State, or local law enforcement agencies in enforcing this regulation.

This notice is issued under authority of 33 CFR 100.1306 and 5 U.S.C. 552 (a). If the COTP determines that the regulated area need not be enforced for the full duration stated in this notice, he or she may use a Broadcast Notice to Mariners to grant general permission to enter the regulated area.

Dated: April 13, 2010

Suzanne E. Englebert,

Captain, U.S. Coast Guard, Captain of the Port, Puget Sound.

[FR Doc. 2010–10499 Filed 5–4–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2009–0249]

RIN 1625–AA09

Drawbridge Operation Regulation; CSX Railroad, Trout River, Mile 0.9, Jacksonville, FL

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is changing the regulation governing the operation of the CSX Railroad Bridge across the Trout River, mile 0.9, Jacksonville, Florida. This rule will allow the bridge to operate using an automated system, without an onsite bridge tender. Currently, the bridge is required to open on signal from 6 a.m. until 10 p.m.; and from 10 p.m. until 6 a.m. the draw shall open on signal if at least 12 hours notice is given.

DATES: This rule is effective June 4, 2010.

ADDRESSES: Comments and related materials received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG–2009–0249 and are available online by going to *http://www.regulations.gov,* inserting USCG–2009–0249 in the "Keyword" box, and then clicking "Search." This material is also available for inspection or copying at the Docket Management

Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or e-mail Mr. Michael Lieberum, *Michael.b.lieberum@uscg.mil,* Seventh Coast Guard District, Bridge Branch, 909 S.E. 1st Ave., Miami, FL 33131, telephone number 305–415–6744. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On June 4, 2009, we published a notice of proposed rulemaking (NPRM) entitled CSX Railroad, Trout River, mile 0.9, Jacksonville, FL in the **Federal Register** (74 FR 106). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Background and Purpose

The bridge owner, CSX Railroad, has requested that the Coast Guard remove the existing regulations governing the operation of the CSX Railroad Bridge over the Trout River and allow the bridge to operate utilizing an automated system. The request is made because there are only four train transits per day that are short in duration. Under the proposed rule, the bridge would remain in the open position to vessel traffic at all times, closing only to accommodate train traffic.

The CSX Railroad Bridge is located on the Trout River, mile 0.9, Jacksonville, Florida. The current regulation governing the operation of the CSX Railroad Bridge is published in 33 CFR 117.337 and requires the bridge to open on signal from 6 a.m. until 10 p.m.; and from 10 p.m. until 6 a.m. the draw shall open on signal if at least 12 hours notice is given.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. This rule will provide less restrictive vessel traffic flow as the bridge will be in the open position and only lowered when a train approaches the bridge.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will have less of an impact on small entities as the bridge will be in the open position and will be closed for short periods of time as trains transit across this bridge.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), in the NPRM we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that might disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency

provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (32)(e), of the Instruction.

Under figure 2–1, paragraph (32)(e), of the Instruction, an environmental analysis checklist and a categorical exclusion determination are not required for this rule.

List of Subjects in 33 CFR Part 117

Bridges.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 117.337 as follows:

§ 117.337 Trout River.

The draw of the CSX Railroad Bridge across the Trout River, mile 0.9 at Jacksonville, operates as follows:

(a) The bridge is not tended.

(b) The draw is normally in the fully open position, displaying green lights to indicate that vessels may pass.

(c) As a train approaches, provided the scanners do not detect a vessel under the draw, the lights change to flashing red and a horn continuously sounds while the draw closes. The draw remains closed until the train passes.

(d) After the train clears the bridge, the lights continue to flash red and the horn again continuously sounds while the draw opens, until the draw is fully open and the lights return to green.

Dated: April 21, 2010.

R.S. Branham,

Rear Admiral, U.S. Coast Guard, Commander, Seventh Coast Guard District.

[FR Doc. 2010–10497 Filed 5–4–10; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2010–0124]

RIN 1625–AA00

Safety Zone; St. Louis River, Tallas Island, Duluth, MN

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone around the Tallas Island area of the St. Louis River, Duluth, Minnesota. All vessels are prohibited from transiting the zone unless specifically authorized by the Captain of the Port or a designated representative. This temporary safety zone is necessary in order to ensure the safety of the general public from hazards associated with the dredging project.

DATES: *Effective Date:* this rule is effective in the CFR from May 5, 2010 until 11:59 p.m. November 30, 2010. This rule is effective with actual notice for purposes of enforcement beginning 12:01 a.m. May 1, 2010 through 11:59 p.m. November 30, 2010.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG–2010–0124 and are available online by going to *http://www.regulations.gov,* inserting USCG–2010–0124 in the "Keyword" box, and then clicking "Search." They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary rule, call or e-mail LT Aaron Gross, Chief of Port Operations, MSU Duluth, Coast Guard; telephone (218) 720–5286 Ext. 111, e-mail *aaron.l.gross@uscg.mil.* If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Regulatory Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the publishing of an NPRM would be impracticable and contrary to public interest as immediate action is necessary to provide for the safety of life and property on navigable waters. The Coast Guard will issue broadcast notice to mariners to advise vessel operators of navigational restrictions. On-scene Coast Guard and local law enforcement vessels will also provide actual notice to mariners.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register.** Delaying the effective date would be contrary to public interest because the hazards associated with dredging projects could lead to severe injury, fatalities, and/or destruction of public property. Therefore, immediate action is needed to ensure the public's safety.

Basis and Purpose

This temporary safety zone is necessary to ensure the safety of the general public from the potential threat associated with the dredging project beginning at Tallas Island, St. Louis River. The Captain of the Port Duluth has determined this activity could pose significant risk to public safety and property. Establishing a safety zone to control vessel movement around the location of the work site will help prevent damage and injury to workers on the site, any recreational vessels, the public and help minimize the associated risks.

Discussion of Rule

The following area will be a temporary safety zone: Near Tallas Island on the St. Louis River to include all waters contained within the zone located at 46°42.30 N 092°11.56 W and then run northeast to position; 46°42.53 N 092°11.30 W and then run northwest to position; 46°43.5 N 092°11.41 W and then run southwest to position; 46°42.37 N 092°12.11 W and then running southeast back to the starting point (NAD 83). The safety zone's boundary is approximately 3500 ft. by 1500 ft. on the long end, extending behind Tallas Island, and 3000 ft by 1500 ft on the short end, extending into open waters. The safety zone will be effective from May 1, 2010 through November 30, 2010.

All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene representative. Entry into, transiting, or anchoring within the safety zone will be prohibited unless authorized by the Captain of the Port Duluth or his designated on-scene representative. The Captain of the Port or his designated on-scene representative may be contacted via VHF Channel 16.

Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 13 of these statutes or executive orders.

Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order.

Although this regulation will restrict access to the area, the effect of this rule will not be significant because: (i) The safety zone is a limited size; (ii) vessels may be granted permission to transit the area by the Captain of the Port or a designated representative .

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule will affect the following entities, some of which may be small entities: Owners or operators of vessels operating in the St. Louis River intending to transit through or anchor in the waters near Tallas Island during the effective period of the safety zone. This rule will not have a significant economic impact on the owners or operators of affected vessels because the rule is temporary in nature, lasting for only a few months. Also, it affects a relatively small area of water along the St. Louis River. Therefore, vessels can easily transit around the zone. In addition, the safety zone will not limit any residential or public access areas. Finally, small entities needing entry into the temporary safety zone might gain access via communications with the Captain of the Port or designated representative.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offer to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

This rule will not cause a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not create an environmental risk to health or risk to safety that may disproportionately affect children.

Indian Tribal Governments

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not

likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the Office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.,* specifications of materials, performance, design, or operation; test methods; sampling procedures; and related management systems practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction. This rule involves the establishment of a safety zone established to protect the public from the dangers associated with dredging operations and therefore, is categorically excluded.

An environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165–REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1

■ 2. Add § 165.T09–0124 to read as follows:

§ 165.T09–0124 Safety Zone; St. Louis River, Tallas Island, Duluth, MN

(a) *Location.* The following area is a temporary safety zone: near Tallas Island on the St. Louis River to include all waters contained within the zone located at 46°42.30 N 092°11.56 W and then run northeast to position; 46°42.53 N 092°11.30 W and then run northwest to position; 46°43.5 N 092°11.41 W and then run southwest to position; 46°42.37 N 092°12.11 W and then running southeast back to the starting point (NAD 83). The safety zone's boundary is approximately 3500 ft. by 1500 ft. on the long end, extending behind Tallas Island, and 3000 ft by 1500 ft on the short end, extending into open waters.

(b) *Effective Dates.* This rule is effective from 12:01 a.m. May 1, 2010 until 11:59 p.m. November 30, 2010.

(c) *Regulations.* (1) In accordance with the general regulations in section 165.23 of this part, entry into this zone is prohibited unless authorized by the Coast Guard Captain of the Port Duluth, or his designated on-scene representative.

(2) This safety zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Duluth or his designated on-scene representative.

(3) The "on-scene representative" of the Captain of the Port is any Coast Guard commissioned, warrant, or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his designated on-scene representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the safety zone shall contact the Captain of the Port Duluth or his on-scene representative to obtain permission to do so. Vessel operators permitted to enter or operate in the safety zone must comply with the instructions given to them by the Captain of the Port Duluth or his on-scene representative.

Dated: April 5, 2010.

M.P. Lebsack,

Commander, U.S. Coast Guard, Captain of the Port Duluth.

[FR Doc. 2010–10498 Filed 5–4–10; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2009–0513; FRL–9136–7]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Volatile Organic Compound Automobile Refinishing Rules for Indiana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving into the Indiana State Implementation Plan (SIP) amendments to Indiana's automobile refinishing rule. These rule revisions extend the applicability of Indiana's approved volatile organic compound (VOC) automobile refinishing rules to all persons in Indiana who sell or manufacture automobile refinishing coatings or who refinish motor vehicles. The rules are approvable because they are consistent with the Clean Air Act (Act) and EPA regulations, and should result in additional VOC emission reductions throughout Indiana. EPA proposed these rules for approval on January 14, 2010, and received one favorable comment.

DATES: This final rule is effective on June 4, 2010.

ADDRESSES: EPA has established a docket for this action under Docket ID Nos. EPA–R05–OAR–2009–0513. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *http://www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that

you telephone Steven Rosenthal, Environmental Engineer, at (312) 886–6052 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Steven Rosenthal, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6052.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. What public comments were received on the proposed approval and what is EPA's response?

One comment in support of Indiana's rule revision was received.

II. What action is EPA taking today and what is the purpose of this action?

EPA is approving rule revisions that broaden the coverage of Indiana's VOC automobile refinishing SIP rules to include all persons in Indiana who sell or manufacture automobile refinishing coatings or who refinish motor vehicles. These rules had previously applied only in Clark, Floyd, Lake, Porter, and Vanderburgh Counties. Given the revised rule's focus on VOC coating limitations and work practice standards, Indiana has also deleted references to control technology requirements.

In EPA's January 14, 2010, proposal (75 FR 2090), we present a detailed legal and technical analysis of the State's submission. The reader is referred to that notice for additional background on the submission and the bases for EPA's approval.

III. Statutory and Executive Order Reviews

Under the Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 6, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 31, 2010.

Walter W. Kovalick Jr.,

Acting Regional Administrator, Region 5.

■ 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart P—Indiana

■ 2. Section 52.770 is amended by adding paragraph (c)(195) to read as follows:

§ 52.770 Identification of plan.

* * * * *

(c) * * *

(195) On June 5, 2009, the Indiana Department of Environmental Management submitted amendments to Indiana's automobile refinishing rule for approval into its state implementation plan (SIP). These rule revisions extend the applicability of Indiana's approved volatile organic compound (VOC) automobile refinishing rules to all persons in Indiana who sell or manufacture automobile refinishing coatings or who refinish motor vehicles.

(i) Incorporation by reference.

(A) Indiana Administrative Code Title 326: Air Pollution Control Board, Article 8: Volatile Organic Compound Rules, Rule 10: Automobile Refinishing, filed with the Publisher of the Indiana Register on March 27, 2009, and became effective on April 26, 2009. Published in

the Indiana Register on April 22, 2009 (DIN: 20090422–IR–326060603FRA).

[FR Doc. 2010–10405 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2010–0218; FRL–9135–3]

Revisions to the California State Implementation Plan, Placer County Air Pollution Control District, Sacramento Metropolitan Air Quality Management District, San Joaquin Valley Unified Air Pollution Control District, and South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve revisions to the Placer County Air Pollution Control District (PCAPCD), Sacramento Metropolitan Air Quality Management District (SMAQMD), San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD), and South Coast Air Quality Management District (SCAQMD) portions of the California State Implementation Plan (SIP). These revisions concern volatile organic compound (VOC) emissions from petroleum facilities, chemical plants, and facilities which use organic solvents. We are approving local rules that regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: This rule is effective on July 6, 2010 without further notice, unless EPA receives adverse comments by June 4, 2010. If we receive such comments, we will publish a timely withdrawal in the **Federal Register** to notify the public that this direct final rule will not take effect.

ADDRESSES: Submit comments, identified by docket number [EPA–R09–OAR–2010–0218], by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Nicole Law, EPA Region IX, (415) 947–4126, *law.nicole@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us," and "our" refer to EPA.

Table of Contents

I. The State's Submittal

A. What rules did the State submit?

Table 1 lists the rules we are approving with the dates that they were adopted by the local air agencies and submitted by the California Air Resources Board.

TABLE 1—SUBMITTED RULES

Local agency	Rule No.	Rule title	Adopted/ amended	Submitted
PCAPCD	216	Organic Solvent Cleaning and Degreasing Operations	12/11/03	07/18/08
SMAQMD	466	Solvent Cleaning	05/23/02	09/15/09
SJVUAPCD	4661	Organic Solvents	09/20/07	03/07/08
SCAQMD	1173	Control of Volatile Organic Compound Leaks and Releases from Components at Petroleum Facilities and Chemical Plants.	02/06/09	01/10/10

On January 21, 2010, EPA determined that the submittal for SMAQMD Rule 466 met the completeness criteria in 40 CFR Part 51 Appendix V, which must be met before formal EPA review. On April 17, 2008, EPA determined that the submittal for SJVUAPCD Rule 4661 met the completeness criteria. On February 4, 2010, EPA determined that the submittal for SCAQMD Rule 1173 met the completeness criteria. The July 18, 2008 submittal for PCAPCD Rule 216 became complete by operation of law on January 18, 2009.

B. Are there other versions of these rules?

There are no previous versions of SMAQMD Rule 466 in the SIP. We approved earlier versions of PCAPCD Rule 216, SJVUAPCD Rule 4661, and SCAQMD Rule 1173 into the SIP on April 30, 1996 (61 FR 18962), July 27, 2002 (67 FR 47701), and August 25,

1994 (59 FR 43751). SCAQMD adopted earlier versions of Rule 1173 on December 6, 2002 and June 1, 2007, and CARB submitted them to us on December 29, 2006 and April 6, 2009. The PCAPCD, SJVUAPCD, and SCAQMD adopted revisions to the SIP-approved versions on December 11, 2003, September 20, 2007, and February 6, 2009 and CARB submitted them to us on July 18, 2008, March 7, 2008, and January 10, 2010. While we can act on only the most recently submitted version, we have reviewed materials provided with previous submittals.

C. What is the purpose of the submitted rules or rule revisions?

VOCs help produce ground-level ozone and smog, which harm human health and the environment. Section 110(a) of the CAA requires States to submit regulations that control VOC emissions. The submitted rules control VOC emissions from petroleum facilities, chemical plants, and solvent usage. EPA's technical support documents (TSDs) have more information about these rules.

II. EPA's Evaluation and Action

A. How is EPA evaluating the rules?

Generally, SIP rules must be enforceable (see section 110(a) of the Act), must require Reasonably Available Control Technology (RACT) for each category of sources covered by a Control Techniques Guidelines (CTG) document as well as each major source in nonattainment areas (see sections 182(a)(2) and (b)(2)), and must not relax existing requirements (see sections 110(l) and 193). The PCAPCD, SMAQMD, SJVUAPCD, and SCAQMD regulate ozone nonattainment areas (see 40 CFR part 81), so Rule 466, Rule 4661, and Rule 1173 must fulfill RACT.

Guidance and policy documents that we use to evaluate enforceability and RACT requirements consistently include the following:

1. "Issues Relating to VOC Regulation Cutpoints, Deficiencies, and Deviations," EPA, May 25, 1988 (the Bluebook).

2. "Guidance Document for Correcting Common VOC & Other Rule Deficiencies," EPA Region 9, August 21, 2001 (the Little Bluebook).

3. "Control of Volatile Organic Emissions from Solvent Metal Cleaning," EPA–450/2–77–022, November 1977.

4. "Control Techniques Guidelines for Industrial Cleaning Solvents," EPA–453/R–06–001, September 2006.

5. "Organic Solvent Cleaning and Degreasing Operations," CARB, July 18, 1991.

B. Do the rules meet the evaluation criteria?

We believe these rules are consistent with the relevant policy and guidance regarding enforceability, RACT, and SIP relaxations. The TSDs have more information on our evaluation.

C. EPA Recommendations to Further Improve the Rules

The TSDs describe additional rule revisions that we recommend for the next time the local agency modifies the rules.

D. Public Comment and Final Action

As authorized in section 110(k)(3) of the Act, EPA is fully approving the submitted rules because we believe they fulfill all relevant requirements. We do not think anyone will object to this approval, so we are finalizing it without proposing it in advance. However, in the Proposed Rules section of this **Federal Register,** we are simultaneously proposing approval of the same submitted rules. If we receive adverse comments by June 4, 2010, we will publish a timely withdrawal in the **Federal Register** to notify the public that the direct final approval will not take effect and we will address the comments in a subsequent final action based on the proposal. If we do not receive timely adverse comments, the direct final approval will be effective without further notice on July 6, 2010. This will incorporate the rules into the federally enforceable SIP.

Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment.

III. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**.

This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 6, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the Proposed Rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 18, 2010.

Jared Blumenfeld,

Regional Administrator, Region IX.

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraphs (c)(354)(i)(E)(*13*) and (359)(i)(C)(*2*) and (377)(i)(A)(*2*) and (378) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(354) * * *

(i) * * *

(E) * * *

(*13*) Rule 4661, "Organic Solvents," amended on September 20, 2007.

* * * * *

(359) * * *

(i) * * *

(C) * * *

(*2*) Rule 216, "Organic Solvent Cleaning and Degreasing Operations," amended on December 11, 2003.

* * * * *

(377) * * *

(i) * * *

(A) * * *

(*2*) Rule 466, "Solvent Cleaning," adopted on May 23, 2002.

(378) New and amended regulations were submitted on January 10, 2010 by the Governor's designee.

(i) Incorporation by Reference.

(A) South Coast Air Quality Management District.

(*1*) Rule 1173, "Control of Volatile Organic Compound Leaks and Releases from Components at Petroleum Facilities and Chemical Plants," amended on February 6, 2009.

* * * * *

[FR Doc. 2010–10402 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2009–0960; FRL–9137–8]

Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing approval of revisions to the San Joaquin Valley Unified Air Pollution Control District (SJVAPCD) portion of the California State Implementation Plan (SIP). These revisions were proposed in the **Federal Register** on January 22, 2010 and concern oxides of nitrogen (NOx) emissions from residential water heaters. We are approving a local rule that regulates this emission source under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: *Effective Date:* This rule is effective on June 4, 2010.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2009–0960 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Idalia Perez, EPA Region IX, (415) 972–3248, *perez.idalia@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, "we," "us" and "our" refer to EPA.

Table of Contents

I. Proposed Action

On January 22, 2010 (75 FR 3680), EPA proposed to approve the following rule into the California SIP.

Local agency	Rule #	Rule title	Adopted	Submitted
SJVAPCD	4902	Residential Water Heaters	3/19/09	4/29/09

We proposed to approve this rule because we determined that it complied with the relevant CAA requirements. Our proposed action contains more information on the rule and our evaluation.

II. Public Comments and EPA Responses

EPA's proposed action provided a 30-day public comment period. During this period, we received no comments.

III. EPA Action

No comments were submitted that change our assessment that the submitted rule complies with the relevant CAA requirements. Therefore, as authorized in section 110(k)(3) of the Act, EPA is fully approving this rule into the California SIP.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve State choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves State law as meeting Federal requirements and does not impose additional requirements beyond those imposed by State law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 6, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (*see* section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: March 18, 2010.

Jared Blumenfeld,

Regional Administrator, Region IX.

■ Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

■ 1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart F—California

■ 2. Section 52.220, is amended by adding paragraphs (c)(362)(i)(D)(*1*) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(362) * * *

(i) * * *

(D) San Joaquin Valley Air Pollution Control District.

(*1*) Rule 4902, "Residential Water Heaters," amended on March 19, 2009.

* * * * *

[FR Doc. 2010–10404 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[EPA–R09–OAR–2008–0467; FRL–9141–8]

Designation of Areas for Air Quality Planning Purposes; California; San Joaquin Valley, South Coast Air Basin, Coachella Valley, and Sacramento Metro 8-Hour Ozone Nonattainment Areas; Reclassification

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Under the Clean Air Act (CAA or "Act"), EPA is granting requests by the State of California to reclassify the following four areas designated as nonattainment for the 1997 8-hour ozone national ambient air quality standard (NAAQS): The San Joaquin Valley area from "serious" to "extreme," the South Coast Air Basin area from "severe-17" to "extreme," and the Coachella Valley and Sacramento Metro areas from "serious" to "severe-15." In connection with the reclassifications, EPA is setting a deadline of no later than 12 months from the effective date of reclassification for submittal of revisions to the Sacramento Metro area portion of the California State Implementation Plan (SIP) to meet the additional new source review (NSR) requirements for "severe-15" 8-hour ozone nonattainment areas. EPA is deferring the setting of a submittal deadline for certain fee rules under section 185 of the CAA. A number of Indian tribes have Indian country located within the boundaries of the affected areas. The State of California is not approved to administer any CAA programs in Indian country, and the relevant Indian tribes have not applied for eligibility to administer programs under the CAA for their areas. In these circumstances, EPA implements relevant reclassification provisions of the CAA in these Indian country areas and is reclassifying these areas, except Indian country pertaining to the Morongo Band of Mission Indians ("Morongo Tribe") and the Pechanga Band of Luiseño Mission Indians ("Pechanga Tribe"), in keeping with the classifications of nonattainment areas

within which they are located. EPA is deferring the reclassification of Indian country pertaining to the Morongo and Pechanga Tribes pending EPA's final decisions on their previously-submitted boundary change requests. In connection with this final action, EPA notified the affected tribal leaders and consulted with interested tribes.

DATES: *Effective Date:* This rule is effective on June 4, 2010.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2008–0467 for this action. The index to the docket is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available in either location (*e.g.*, confidential business information). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Rory Mays, Air Planning Office (AIR–2), U.S. Environmental Protection Agency, Region IX, (415) 972–3227, *mays.rory@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, the terms "we," "us," and "our" refer to EPA.

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I. Proposed Action

On August 27, 2009 (74 FR 43654), we proposed to grant the following reclassification requests by the State of California: the San Joaquin Valley area from "serious" to "extreme," the South Coast Air Basin area from "severe-17" to "extreme," and the Coachella Valley and Sacramento Metro areas from "serious" to "severe-15."

We proposed approval of these requests under section 181(b)(3) of the CAA, which provides for "voluntary reclassification" and states: "The Administrator shall grant the request of any State to reclassify a nonattainment area in that State in accordance with Table 1 of subsection (a) of this section to a higher classification. The Administrator shall publish a notice in the **Federal Register** of any such request and of action by the Administrator granting the request." The provision for voluntary reclassification has been brought forward as part of the transition from the 1-hour ozone standard to the 8-hour ozone standard. *See* 40 CFR 51.903(b) ("A State may request a higher classification for any reason in accordance with section 181(b)(3) of the CAA") and 40 CFR 51.903(a) Table 1.

For each of the four areas, we compared a list of the specific additional requirements that would be triggered for each area as a consequence of our approval of the reclassification requests with the revisions to the SIP that the State of California had already submitted. For any requirement in any area lacking a submittal from the State, we proposed a deadline for submission.

Based on this evaluation, we proposed to establish a deadline of no later than 12 months from the effective date of reclassification for submittal of revisions to the Coachella Valley portion of the SIP to meet the CAA section 185 fee requirements ("section 185 fee rules"). EPA also proposed the same deadline for submittal of revisions to the Sacramento Metro area portion of the SIP to meet the following additional SIP requirements for "severe-15" areas: NSR rules consistent with this classification (Sacramento Metropolitan Air Quality Management District (AQMD), Placer County Air Pollution Control District (APCD), and Feather River AQMD only) and section 185 fee rules (El Dorado County AQMD, Placer County APCD, Feather River AQMD, and Yolo-Solano AQMD only). As discussed in section II of this final rule, EPA has decided to defer setting a SIP submittal deadline for section 185 fee rules.

In our proposed rule, we considered the relevance of the State's reclassification requests to reclassification of Indian country [1] located within the four nonattainment areas. We proposed to directly administer CAA section 181(b)(3) and reclassify Indian country geographically located in the nonattainment areas that are the subject of the State's reclassification requests in order to avoid inappropriate and infeasible results, consistent with EPA's discretionary authority in CAA sections 301(a) and 301(d)(4) to directly administer CAA programs and to protect air quality in Indian country through federal implementation.

In so doing, we explained why uniformity of classification throughout a nonattainment area is a guiding principle and premise when an area is being reclassified. We noted that ground-level ozone continues to be a pervasive pollution problem in areas throughout the United States and that ozone and precursor pollutants that cause ozone can be transported throughout a nonattainment area. Therefore, boundaries for nonattainment areas are drawn to encompass both the areas that violate the NAAQS as well as nearby contributing areas. For certain areas designated as nonattainment for the 8-hour ozone NAAQS, such as those to which this action applies, initial classifications occur by operation of law and exactly match the boundaries of the respective nonattainment areas. We believe that this approach best ensures public health protection from the adverse effects of ozone pollution and that, therefore, it is generally counterproductive from an air quality and planning perspective to have a disparate classification for a land area located within the boundaries of a nonattainment area, such as the Indian country contained in the ozone nonattainment areas at issue here. Moreover, we noted that violations of the 8-hour ozone standard, which are measured and modeled throughout each nonattainment area, as well as shared meteorological conditions, would dictate the same result. Furthermore, emissions changes in lower-classified ozone areas could hinder planning efforts to attain the NAAQS within the overall area through the application of less stringent requirements relative to those that apply in the areas with higher ozone classifications.

With regard to the Indian country at issue in our proposed action, EPA also took into account other factors. For example, we proposed that the likelihood of attainment by the applicable deadline under the current classification is an appropriate consideration for reclassifying Indian country within the larger nonattainment areas. If EPA believes it is likely that a given ozone nonattainment area will not attain the ozone NAAQS by the applicable attainment date, then it may be an additional reason why it is appropriate to maintain a uniform classification within the nonattainment area and thus to reclassify the Indian

[1] "Indian country" as defined at 18 U.S.C. 1151 refers to: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

country consistent with the State's request to reclassify the non-Indian country portion of the area. On the other hand, if EPA believes that meeting the original attainment date for the whole nonattainment area appears still to be a reasonable possibility, then it conceivably might be appropriate for EPA to decline to reclassify Indian country, notwithstanding the State's request to reclassify the State portion of the area, and notwithstanding the generally weighty considerations that support the retention of a single uniformly-classified nonattainment area. Such considerations include the pervasive nature of the ozone problem, and the transport of ozone and ozone precursors over a wide geographic area. Depending on the circumstances, other factors might also provide justifications for refraining from reclassifying Indian country in conjunction with granting a State's request for voluntary reclassification of State areas in the same nonattainment area.

With respect to the four subject areas, we evaluated the likelihood of attainment by the area's existing attainment deadline, based on information that is currently available. That evaluation was aided by the fact that the State of California has already submitted attainment demonstrations for these four areas that are intended to support later attainment dates under their requested new, higher classifications. We also noted that EPA was not determining which new attainment date is as expeditious as practicable for each area, nor whether these attainment demonstrations are approvable.

In light of the considerations we outlined in our proposal and reiterated above that support retention of uniformly-classified ozone nonattainment areas, and the evidence (in the form of plan submittals for the four areas) that provides support for an attainment date beyond the date applicable under the current classifications, we proposed to reclassify the Indian country within each area [2] as follows: Areas within San Joaquin Valley and South Coast Air Basin to "extreme", and areas within Coachella Valley and Sacramento Metro to "severe-15." As discussed in section III of this final rule, EPA has decided to defer reclassification of Indian country pertaining to the Morongo Tribe and the Pechanga Tribe pending EPA's final decisions on their boundary change requests.

Please *see* our August 27, 2009 proposed rule (74 FR 43654) for additional background and a more detailed explanation of our proposed action.

II. Deferral of SIP Submittal Deadlines for CAA Section 185 Fee Rules

In our August 27, 2009 proposed rule, we proposed to set a deadline of no later than 12 months from the effective date of the final reclassifications for the State of California to submit revisions to the SIP to address CAA section 185 fee requirements for certain 8-hour ozone nonattainment areas: Coachella Valley and Sacramento Metro (El Dorado County AQMD, Placer County APCD, Feather River AQMD, and Yolo-Solano AQMD only).

Upon further consideration, we have decided to defer the setting of a deadline for submittal of a SIP revision addressing the section 185 fee requirements for any area affected by this action. Under CAA section 185, the obligation to collect fees could not be triggered until after an area fails to attain the NAAQS by its applicable attainment date. Assuming that the maximum period for attainment represents the date for which attainment is as "expeditious as practicable" in the areas subject to the new 8-hour classifications under today's rulemaking, the obligation to collect fees under any fee rule submitted to comply with section 185 could not possibly be due until after June 15, 2019 (for Sacramento Metro and Coachella Valley) or after June 15, 2024 (for San Joaquin Valley and the South Coast). EPA recently issued guidance regarding 1-hour ozone anti-backsliding fee programs [3] but has not yet completed its consideration of the relationship between 1-hour and 8-hour fee programs for these areas. There is at present no immediate need to set a deadline for submission of the 8-hour fees SIP program as we believe that there will be sufficient time for EPA to establish a SIP revision deadline for this requirement and for the State of California to develop and submit the necessary fee rules.[4] Indeed, in a previous EPA action granting a request for voluntary reclassification of the Houston-Galveston-Brazoria (Texas) 8-hour ozone nonattainment area to "severe-15", EPA also deferred setting a deadline for the section 185 fee SIP submission. *See* 73 FR 56983 (October 1, 2008), especially footnote 1.

III. Deferral of Reclassification for Morongo Band of Mission Indians and Pechanga Band of Luiseño Mission Indians

As described in section I ("Proposed Action") above, in our August 27, 2009 proposed rule, we proposed to directly administer CAA section 181(b)(3) and reclassify Indian country within the four subject areas in keeping with the State's reclassification requests for the surrounding non-Indian country lands and consistent with EPA's discretionary authority in CAA section 301(a) and 301(d)(4) to directly administer CAA programs and protect air quality in Indian country through federal implementation. For the South Coast Air Basin nonattainment area, we named seven tribes whose Indian country would be reclassified to "extreme" for 8-hour ozone.

Two of these tribes, the Morongo and Pechanga Tribes, submitted comments on our proposed action in which they objected to being reclassified to "extreme." (*See* section IV ("Public Comments and EPA Responses") below.) In their comment letters, the Tribes reiterated their requests from May 29, 2009 and June 23, 2009, respectively, for boundary changes to establish separate nonattainment areas or, in the alternative, to extend the boundaries of adjacent, lower-classified nonattainment areas to include the Tribes' Indian country. We refer to these requests herein as "boundary change" requests. The Tribes' comment letters also provided substantive analyses to

[2] In section III.B of the preamble to the proposed rule, we identified the tribes with Indian country in each of the four subject nonattainment areas. In so doing, we inadvertently failed to identify two tribes that have Indian country in Coachella Valley: The Santa Rosa Band of Cahuilla Indians and the Twenty-Nine Palms Band of Mission Indians. EPA had invited both tribes to consult with EPA regarding prospective EPA action to reclassify Indian country within five nonattainment areas in California, including the four areas subject to today's action as well as Western Mojave Desert. (As noted in footnote #8 of the preamble to the proposed rule, EPA plans to take action related to California's reclassification request for Western Mojave Desert in a separate rulemaking.) Since we inadvertently failed to identify these two Tribes as having Indian country in Coachella Valley in section III.B of the proposed rule, we contacted them to clarify that our proposal to reclassify Indian country areas within Coachella Valley to "severe-15" relates to all Indian country located therein notwithstanding the incomplete list of such areas in section III.B of the proposal. Neither Tribe has responded to EPA's invitation to consult nor expressed either their assent or objection to reclassification of their lands in Coachella Valley in response to our contacts on this matter.

[3] Memorandum from Stephen D. Page, Director, Office of Air Quality Planning and Standards, "Guidance on Developing Fee Programs Required by Clean Air Act Section 185 for the 1-hour Ozone NAAQS," January 5, 2010.

[4] Notwithstanding our decision to defer setting a SIP revision deadline for section 185 fee rules, we note that, upon reclassification, the requirement to submit SIP revisions meeting the requirements of CAA section 185 will apply to each of the four subject areas of this action by virtue of being classified as "severe-15" or "extreme" for the 8-hour ozone NAAQS.

support their objections to reclassification that largely mirror their boundary change requests. In both cases, the Tribes specifically request that no change be made to the classification of their respective Indian country located within the South Coast Air Basin pending EPA's final decisions regarding the Tribes' boundary change requests.

Upon consideration of these comments, we have decided to defer the reclassification of the Indian country pertaining to the Morongo and Pechanga Tribes within the South Coast Air Basin ("the Morongo and Pechanga Reservations") to "extreme" for the 8-hour ozone standard, pending our final decisions on the Tribes' boundary change requests to avoid any inconsistency that might result from reclassification of the Morongo and Pechanga Reservations and decisions addressing the Tribes' boundary change requests. We believe that this deferral will avoid confounding our further consideration of the Tribes' boundary change requests.

If we grant a boundary change for either Tribe, we will specify the consequence of such action in a separate rulemaking on the designation and classification of that Tribe's Reservation. If we deny a boundary change request for either Tribe, we will take final action on our August 27, 2009 proposal to reclassify that Tribe's Reservation to "extreme", consistent with the rest of the nonattainment area, after due consideration of the Tribe's submitted comments. Until those separate actions are finalized, the Indian country of the Morongo and Pechanga Tribes in the South Coast Air Basin area will retain a classification of "severe-17" for the 1997 8-hour ozone NAAQS.

This deferral of our decisions on reclassification is limited in scope to the Morongo and Pechanga Reservations, and in time only until EPA finalizes our decisions on these Tribes' boundary change requests. We are finalizing the reclassification of all other Indian country in the four subject areas to higher classifications in keeping with the State's reclassification requests, including the five other Tribes we listed in our proposed rule as having Indian country within the South Coast Air Basin. (*See* section V ("Final Action") below.)

IV. Public Comments and EPA Responses

The publication of EPA's proposed rule on August 27, 2009 (74 FR 43654) started a public comment period that ended on September 28, 2009. During this period, we received a comment letter from the Morongo Tribe, and an anonymous comment letter. We also accepted a comment letter received from the Pechanga Tribe on October 6, 2009, after the comment period had closed. In the paragraphs that follow, we summarize the comments from the Morongo and Pechanga Tribes and the anonymous commenter, and provide our responses.

Comment #1: The Morongo Tribe, in its comments, highlights its May 29, 2009 request to EPA (and accompanying rationale and documentation) for the establishment of a separate nonattainment area for the Morongo Reservation or, in the alternative, for a boundary change to extend the western boundary of the Coachella Valley nonattainment area to include the Morongo Reservation. With respect to the proposed reclassification of Indian country in the South Coast Air Basin, which includes the Morongo Reservation, to "extreme" for the 8-hour ozone NAAQS, the Morongo Tribe objects to our proposal to reclassify the Morongo Reservation in the same manner as the South Coast Air Basin. The Tribe argues that the Morongo Reservation should be treated as its own nonattainment area or, in the alternative, should be redesignated as part of the Coachella Valley nonattainment area, and thus retain its existing classification.

The Pechanga Tribe similarly objects to the reclassification of the Pechanga Reservation to "extreme," consistent with the reclassification of the South Coast Air Basin nonattainment area. Like the Morongo Tribe, the Pechanga Tribe points to its June 23, 2009 request to EPA (and accompanying rationale and documentation) for the establishment of a separate nonattainment area for the Pechanga Reservation or, in the alternative, for a boundary change to extend the northern boundary of the San Diego Air Basin nonattainment area to include the entirety of the Pechanga Reservation.

The Morongo and Pechanga Tribes believe that the factors used for initial area designations and for subsequent reclassifications of those areas should be the same. Specifically, the Tribes point to EPA's December 2008 guidance for area designations for the 2008 Revised Ozone NAAQS [5] as the appropriate guidance to apply in evaluating whether to include the Morongo and Pechanga Reservations in the reclassification of the South Coast Air Basin to "extreme." The Morongo Tribe asserts that EPA's failure to use the December 2008 guidance in evaluating whether to include the Morongo Reservation in the reclassification action appears to be an arbitrary and capricious exercise of EPA's authority. The Pechanga Tribe asserts that EPA's failure to use that guidance in evaluating whether to include the Pechanga Reservation in the reclassification action ignores tribal interests. The Tribes contend that the December 2008 guidance provides the factors [6] that EPA should have used for the proposed action with respect to the Morongo and Pechanga Reservations. They also include detailed evaluations of the application of the factors from the December 2008 guidance to their areas, as suggested by the 2008 guidance for determining nonattainment area boundaries in designations for the 2008 Ozone NAAQS.[7]

Based on these evaluations, the Tribes conclude that consideration of the factors from the December 2008 guidance supports a decision not to reclassify the Morongo and Pechanga Reservations along with the South Coast Air Basin, but rather to redesignate the Reservations as separate nonattainment areas and to retain each Reservation's current classification.

Response #1: We disagree that the EPA guidance on initial area designations for the 2008 ozone NAAQS provides the factors we must use in evaluating whether to reclassify Indian country located within a nonattainment area for which a State has voluntarily requested reclassification. That guidance is intended to provide a consistent set of principles to apply in identifying the initial boundaries of nonattainment areas during the designations process. In contrast, once an area's initial boundary is established, the retention of a single uniformly-classified area becomes a guiding principle and premise in determining whether to reclassify Indian country located within the area in light of a State's voluntary request for such a reclassification of non-Indian country lands.

[5] *See* 73 FR 16436 (March 27, 2008) for the 2008 Revised Ozone NAAQS.

[6] *See* Attachment 2 of the memorandum from Robert J. Myers, Principal Deputy Assistant Administrator, "Area Designations for the 2008 Revised Ozone National Ambient Air Quality Standards," December 4, 2008. Attachment 2 is entitled, "Factors EPA Plans to Consider in Determining Nonattainment Area Boundaries in Designations for the 2008 Ozone NAAQS."

[7] EPA is in the process of reconsidering the 2008 8-hour ozone NAAQS. As part of this process, EPA has proposed a revised ozone NAAQS (75 FR 2938, January 19, 2010) and extended the deadline for promulgating designations for the 2008 ozone NAAQS (75 FR 2936, January 19, 2010). Depending on the outcome of this reconsideration, we may issue new guidance for determining ozone nonattainment area boundaries.

We do believe, however, that the December 2008 guidance is appropriate for use in supporting requests for boundary changes, such as the requests submitted by the Morongo Tribe on May 29, 2009 and by the Pechanga Tribe on June 23, 2009.[8] As described in section III of this final rule, we have decided to defer reclassification of the Morongo and Pechanga Reservations pending our final decisions on their boundary change requests.

We acknowledge the Tribe's hypothesis that ozone nonattainment areas may be inherently defined by a single classification as well as a boundary and that retaining the existing classification of the Morongo and Pechanga Reservations would have the effect of creating new ozone nonattainment areas. Under this hypothesis, the application of EPA's December 2008 guidance would be appropriate in evaluating whether to reclassify Indian country consistent with the State's requests for reclassification of non-Indian country. However, use of the guidance in this way is indistinguishable from reconsidering the boundaries of the nonattainment areas themselves, and reconsideration of the boundaries is an action that we explicitly stated we would not be undertaking in the reclassification action. *See* footnote 13 on page 43660 of the preamble to the proposed rule (74 FR 43654). We will, however, consider the Tribes' nine-factor analyses in detail in our consideration of their boundary change requests.

With respect to the factors that we considered in evaluating the appropriateness of reclassification of Indian country in our proposed rule, we provided a number of reasons supporting our use of the guiding principle and premise of uniformity of classification when an area is being reclassified (*see* pages 43659 and 43660). In addition, we also identified certain circumstances when it might be appropriate to defer reclassification of Indian country, notwithstanding the State's request to reclassify the State portion of the area, such as where an area is likely to attain the standard by the attainment date under the existing classification. Thus, other considerations could outweigh the guiding principle and premise of uniformity of classification. Upon consideration of the circumstances in each area, however, we concluded that no such considerations exist in this instance in any of the four subject areas. Therefore, with the exception of the Morongo and Pechanga Reservations for which are deferring final action, we are taking final action today to reclassify the Indian country in the four subject nonattainment areas to higher classifications consistent with the State's reclassification requests for these areas.

Comment #2: The Morongo Tribe asserts that the State of California has no jurisdiction to redesignate or reclassify the Morongo Reservation; that, consequently, California's requests for reclassification have no legal import to the Reservation and cannot serve as the legal basis for the redesignation or reclassification of tribal lands.

Response #2: We agree that the State is not authorized to implement CAA programs in Indian country. The State's requests for reclassification of the four ozone nonattainment areas was the impetus for our proposed action, but did not form the legal basis for our proposed action with respect to Indian country contained therein. Under CAA section 181(b)(3), EPA must grant the requests of the State to reclassify the non-tribal lands in the nonattainment areas. The question then becomes what EPA's action should be with regard to the Indian country contained within these areas. In the preamble to our proposed rule, we described the legal authority we have relied upon to reclassify Indian country in the four subject areas as follows:

> Typically, states are not approved to administer programs under the CAA in Indian country, and California has not been approved by EPA to administer any CAA programs in Indian country. CAA actions in Indian country would thus generally be taken either by EPA, or by an eligible Indian tribe itself under an EPA-approved program. In this instance, none of the affected tribes has applied under CAA section 301(d) for treatment-in-a-similar-manner-as-a-state for purposes of reclassification requests under section 181(b)(3), and none operates any relevant EPA-approved CAA regulatory program (*e.g.*, a tribal implementation plan). In addition, the CAA does not require Indian tribes to develop and seek approval of air programs, and—pursuant to our authority in CAA section 301(d)—EPA has interpreted relevant CAA requirements for submission of air programs as not applying to tribes. See 40 CFR section 49.4. In these circumstances, EPA is the appropriate entity to administer relevant CAA programs in Indian country. EPA is proposing to directly administer CAA section 181(b)(3) and reclassify Indian country geographically located in the nonattainment areas that are the subject of the State's reclassification request, consistent with EPA's discretionary authority in CAA sections 301(a) and 301(d)(4) to directly administer CAA programs and protect air quality in Indian country through federal implementation. Section 301(a) authorizes the Administrator 'to prescribe such regulations as are necessary to carry out his functions under the [the Act.]' Further, section 301(d) provides:
>
> In any case in which the Administrator determines that the treatment of Indian tribes as identical to States is inappropriate or administratively infeasible, the Administrator may provide, by regulation, other means by which the Administrator will directly administer such provision so as to achieve the appropriate purpose.
>
> While tribes may choose to apply for eligibility to adopt implementation plans and seek reclassification of their areas in a manner similar to states, tribes need not do so."

See 74 FR 43654, at 43659 (August 27, 2009).

In today's action, we reaffirm the jurisdictional basis for EPA's authority to decide whether or not to reclassify Indian country in ozone nonattainment areas in keeping with a State's voluntary reclassification request, as per CAA section 181(b)(3). As noted in section III of this final rule, we have decided to defer reclassification of the Morongo and Pechanga Reservations pending our final decisions on their boundary change requests to avoid confounding our further consideration of the Tribes' boundary change requests. For all other Indian country located within the four subject nonattainment areas, under the authorities cited above, we are taking final action today to reclassify such Indian country consistent with the State's reclassification requests.

Comment #3: The Morongo and Pechanga Tribes assert that including the Morongo and Pechanga Reservations in the reclassification of the South Coast Air Basin to "extreme" will negatively impact the Tribe's efforts to develop a tribal air permit program and to facilitate economic development on the Reservation. The Pechanga Tribe believes that including the Pechanga Reservation in the reclassification of the South Coast Air Basin to "extreme" for the 8-hour ozone standard would reduce the applicable "major source" threshold from 25 tons per year, to 10 tons per year, of VOC or NO_X. The Morongo Tribe states that the reclassification of the South Coast Air Basin to "extreme" would further cement the 10 tons per year threshold that began to apply as of the 2003 boundary change that brought the Morongo Reservation inside the South Coast Air Basin. This 10 tons per year threshold would, in the Tribes' view, prevent the implementation of a meaningful minor source permitting program, increase the number of facilities potentially subject to "major

[8] EPA's December 2008 guidance states that the factors, while generally comprehensive, are not intended to be exhaustive. States and tribes may submit additional information they believe is relevant for EPA to consider.

source" new source review with a concomitant increase in the use and cost of tribal staff and facility resources, and increase the number of future facilities subject to title V Federal operating permit requirements.

Response #3: This comment refers specifically to major source thresholds in the South Coast Air Basin, but calls into question the effect of reclassification on major source thresholds for NSR and Title V purposes in Indian country within each of the four subject nonattainment areas. We disagree with the assertion that reclassification of Indian country in the South Coast Air Basin would change the applicable major source threshold for NSR or Title V. Indeed, these thresholds will not change in any of the four subject areas. As explained in detail on page 43661 of the preamble to the proposed rule, the applicable major source thresholds for NSR and Title V would not change due to reclassification because the thresholds for the purposes of NSR and title V that had applied by virtue of the areas' classifications under the 1-hour ozone standard continue to apply as anti-backsliding measures under the 8-hour ozone standard, and the new 8-hour ozone classification for each of the four subject areas, as reclassified, would be the same as each area's corresponding 1-hour ozone classification.

With respect to Indian country within the South Coast Air Basin, including the Morongo and Pechanga Reservations, and within San Joaquin Valley, this means that the applicable major source threshold for NSR and Title V purposes is already 10 tons per year for VOC or NO_X, with or without reclassification to "extreme" for 8-hour ozone, because the South Coast Air Basin and the San Joaquin Valley are already "extreme" for the 1-hour ozone standard. For Indian country within Coachella Valley and Sacramento Metro, this means that the applicable major source threshold for NSR and Title V purposes is already 25 tons per year for VOC or NO_X. Thus, to the extent that a change in NSR major source threshold might affect economic development prospects of any Tribe in one of the four subject nonattainment areas, today's action would have no such effect since it does not change the NSR major source threshold for any Tribe.

As noted previously, we are deferring reclassification of the Morongo and Pechanga Reservations, but for the reasons provided above, neither reclassification to "extreme" nor deferral of reclassification would affect the applicable major source threshold for NSR and Title V purposes within the Morongo and Pechanga Reservations. The applicable major source threshold is already 10 tons per year of VOC or NO_X based on the classification of the South Coast Air Basin under the 1-hour ozone NAAQS.

Comment #4: The Pechanga Tribe states that, for existing and future facilities subject to nonattainment NSR, there is no system in place for facilities on tribal lands to obtain emission reduction credits. As such, these facilities, including those that are Native American-owned, would be at a disadvantage relative to facilities located outside of Indian country.

Response #4: In our Indian country NSR proposal (71 FR 48696, 8/21/2006) we noted that "[d]ue to the limited number of sources in Indian country, offsets are generally not available. We have proposed options for addressing the lack of availability of offsets in Indian country." However, for reasons given above in our response to comment #3, reclassification of Indian country within the four subject nonattainment areas would not affect the offset requirement that emission reduction credits (ERCs) are commonly used to meet. That is, since applicable NSR requirements, including the major source threshold definition and offset requirements, in the four subject areas are based on the areas' classifications for the 1-hour ozone NAAQS, and the new 8-hour ozone classification for each of the four subject areas, as reclassified, would be the same as the area's corresponding 1-hour ozone classification, reclassification would not change the offset requirement. Thus, the problem of the relative lack of available ERCs within the Indian country areas within the four subject areas would not be affected by reclassification.

With respect to the Pechanga Tribe, we once again note that we are deferring reclassification of both the Morongo and Pechanga Reservations pending our decisions on their respective boundary change requests. However, such deferral has no bearing on the applicable NSR offset requirements within these two reservations, nor does it affect the relative lack of available ERCs. The current applicable offset ratio for VOC and NO_X for the Morongo and Pechanga Reservations continues to be based on the classification of the South Coast Air Basin as "extreme" for the 1-hour ozone NAAQS. (*See* CAA sections 182(e)(1) and 182(f) for offset requirements of "extreme" areas.)

Comment #5: The Morongo and Pechanga Tribes assert that reducing the threshold for the applicability of General Conformity requirements from 25 to 10 tons per year VOC or NO_X would require many more projects to demonstrate that their emissions of criteria pollutants will not impede progress toward attainment of the NAAQS.

Response #5: We agree that reclassification of the South Coast Air Basin, as proposed, would lower the applicability threshold under our General Conformity rule from 25 tons per year to 10 tons per year. We also note that reclassification of the other three nonattainment areas would also lower the applicable de minimis thresholds under EPA's General Conformity rule in those areas.

As explained in the preamble of our proposed rule (*see* pages 43658 and 43661), under EPA's General Conformity rule, Federal agencies bear the responsibility of determining conformity of actions in nonattainment and maintenance areas that require Federal permits, approvals, or funding. Therefore, not all projects undertaken by the Tribes are subject to the General Conformity rule, but only those tribal projects that require Federal agency permits, approvals or funding. Moreover, the definition of "indirect emissions" in the General Conformity rule (*see* 40 CFR 93.152) further limits the reach of the rule by requiring that emissions caused by the action be reasonably foreseeable and of the type which the Federal agency can practicably control and can maintain control over due to a continuing program responsibility of the Federal agency.

Furthermore, the potential impacts associated with any lowering of a General Conformity de minimis threshold are not unique to Federal actions proposed in Indian country—they affect Federal actions throughout a given nonattainment area. Please note that the General Conformity rule excludes from the applicability determination that portion of a Federal action that includes major new or modified stationary sources that require a permit under the NSR program (CAA section 173) or the prevention of significant deterioration program (CAA Title I, Part C). *See* 40 CFR 93.153(d)(1).

Lastly, because we have decided to defer reclassification of the Morongo and Pechanga Reservations, the General Conformity threshold will remain at 25 tons per year of VOC or NO_X for these Reservations pending our final decisions on the Tribes' boundary change requests.[9]

[9] The General Conformity de minimis threshold for the South Coast Air Basin, including all Indian country therein except the Morongo and Pechanga Reservations, will be lowered from 25 tons per year to 10 tons per year by virtue of this final rule.

Comment #6: An anonymous commenter states that San Joaquin Valley has not applied the 1-hour ozone anti-backsliding measures and has not reviewed permits according to the NSR requirements of an "extreme" 1-hour ozone nonattainment area. The commenter also states that the lower permitting thresholds and higher offset ratio for San Joaquin Valley have been in effect since the May 2004 action that classified the area as "extreme" for 1-hour ozone. Accordingly, the commenter insists that EPA must require San Joaquin Valley to evaluate all of its permitting actions from that point forward against the requirements of an "extreme" 1-hour ozone classification.

Response #6: This comment is outside the scope of our proposed action. This comment does not challenge our proposed action to grant the State of California's request under 40 CFR 51.903(b) and CAA section 181(b)(3) to reclassify the San Joaquin Valley nonattainment area to "extreme" for the 1997 8-hour ozone standard nor does it challenge our decision not to establish any new SIP revision deadlines for the San Joaquin Valley area. Instead, it pertains to the implementation and enforcement of 1-hour ozone "extreme" NSR permitting requirements in the San Joaquin Valley at the corresponding major source threshold and offset ratio for that classification. As noted in footnote #18 on page 43662 of the preamble to our proposed rule: "The deadlines proposed herein relate solely to specific additional requirements triggered by the reclassification for the 8-hour ozone NAAQS and should not be interpreted as relieving an area of any existing obligation that the area has based on its 1-hour ozone classification, or of existing obligations not related to attainment that are based on its current 8-hour ozone classification."

Moreover, the NSR requirements to which EPA refers in the proposed rule relate to the State of California's obligation to submit SIP revisions meeting the statutory requirements, not to the requirements on new stationary sources and modifications themselves.[10] In March 2009, the State of California submitted a SIP revision including NSR rules that apply in the San Joaquin Valley that are intended to address the "extreme" 8-hour ozone nonattainment area NSR requirements. On April 12, 2010, EPA's Region 9 Regional Administrator signed a final rule to take a limited approval and limited disapproval action on this SIP revision. The pre-publication version of this final rule has been placed in the docket.

V. Final Action

We believe that the plain language of CAA section 181(b)(3) mandates that we approve voluntary reclassification requests,[11] and thus, EPA is taking final action to grant the State's request for the following voluntary reclassifications: the San Joaquin Valley area from "serious" to "extreme"; the South Coast Air Basin area from "severe-17" to "extreme"; and the Coachella Valley and Sacramento Metro areas from "serious" to "severe-15." Upon the effective date of this final action granting the reclassifications, these four areas are required to attain the 8-hour ozone NAAQS as expeditiously as practicable, but not later than the applicable maximum attainment period set forth in 40 CFR 51.903(a), Table 1: June 15, 2024 for San Joaquin Valley and the South Coast Air Basin; and June 15, 2019 for Coachella Valley and Sacramento Metro.[12]

In connection with reclassification of the four subject areas, and for the reasons discussed above and in the proposed rule, we are establishing the deadline of no later than 12 months from the effective date of reclassification for submittal of revisions to the Sacramento Metro portion (Sacramento Metropolitan AQMD, Placer County APCD, and Feather River AQMD only) of the California SIP to meet the NSR requirements of a "severe-15" area. As discussed above, EPA is deferring the setting of a submittal deadline for revision to the California SIP for the four subject areas to meet the requirements of CAA section 185. With the exceptions of submittal requirements for SIP revisions for the NSR requirements for the Sacramento Metro area, and the section 185 fee requirements for the four subject areas, we have determined that the State has submitted SIP revisions for all other additional requirements for the four subject areas. As such, there is no need to establish a deadline for any other SIP revision requirement.[13]

In addition, consistent with our discretionary authority under CAA sections 301(a) and 301(d)(4), and for the reasons discussed above and in the proposed rule, we are similarly finalizing our reclassification of all Indian country within the four areas, except Indian country pertaining to the Morongo and Pechanga Tribes, consistent with the reclassification requests for the surrounding non-Indian country lands. As discussed above, EPA is deferring the reclassification of the Morongo and Pechanga Reservations pending our final decisions on their boundary change requests. In Table 1 below, we list tribes that have Indian country located within the four subject areas of this final action. Aside from the Morongo and Pechanga Reservations, we also note that the reclassifications apply to all Indian country within any of the four subject areas that exists at present or at any future time while the given area continues to be designated as nonattainment. Reclassification lowers the de minimis thresholds for the affected tribes, as per EPA's General Conformity rule (40 CFR part 53, subpart B), but does not lower the applicable "major source" thresholds because the 25 tons per year "major source" thresholds for VOC and NO_X in the Coachella Valley and Sacramento Metro areas, and the 10 tons per year thresholds for VOC and NO_X in the San Joaquin Valley and South Coast areas, already apply under the areas' 1-hour ozone classifications.

[10] *See, e.g.,* page 43658 of the preamble to the proposed rule (74 FR 43654)("In regards to * * * the requirements for SIPs regarding * * * ("new source review"), the reclassifications would not lower the "major source" applicability thresholds required in a revised SIP * * *").

[11] The reclassification requests submitted by the State of California do not explicitly address Indian country located within the various ozone nonattainment areas. We have assumed that the State of California's request relates only to the portions of the nonattainment areas that lie outside of Indian country because the State is not approved to implement the CAA in Indian country located within the state.

[12] Because we are reclassifying Indian country in these areas consistent with the classifications requested by the State (with the exception of the two reservations for which we are deferring reclassification), the new attainment dates apply area-wide to both State lands and Indian country located therein. Unlike the State of California, however, the Indian tribes located within the four subject areas are not subject to specific plan submittal and implementation deadlines under the new ozone classifications. *See* 40 CFR 49.4.

[13] The deadline established through this final action relates solely to specific additional requirements triggered by the reclassification for the 8-hour ozone NAAQS and should not be interpreted as relieving any of the four areas of any existing obligation that an area has based on its 1-hour ozone classification, or of existing obligations unrelated to attainment that are based on an area's original 8-hour ozone classification.

TABLE 1—TRIBES WITH INDIAN COUNTRY LOCATED WITHIN THE FOUR AREAS SUBJECT TO RECLASSIFICATION

San Joaquin Valley	South coast air basin	Coachella Valley	Sacramento metro
Big Sandy Rancheria of Mono Indians (including the Big Sandy Rancheria).	Cahuilla Band of Indians (including the Cahuilla Reservation).	Agua Caliente Band of Cahuilla Indians (including the Agua Caliente Indian Reservation).	Rumsey Indian Rancheria of Wintun Indians (including the Rumsey Indian Rancheria).
Cold Springs Rancheria of Mono Indians (including the Cold Springs Rancheria).	Ramona Band of Cahuilla Mission Indians (including the Ramona Band).	Augustine Band of Cahuilla Indians (including the Augustine Reservation).	Shingle Springs Band of Miwok Indians [including the Shingle Springs Rancheria (Verona Tract).
North Fork Rancheria of Mono Indians (including the North Fork Rancheria).	San Manuel Band of Mission Indians (including the San Manuel Reservation).	Cabazon Band of Mission Indians (including the Cabazon Reservation).	United Auburn Indian Community (including the Auburn Rancheria).
Picayune Rancheria of Chukchansi Indians (including the Picayune Rancheria).	Santa Rosa Band of Cahuilla Indians (including the South Coast Air Basin portion of the Santa Rosa Reservation).	Santa Rosa Band of Cahuilla Indians (including the Coachella Valley portion of the Santa Rosa Reservation).	
Santa Rosa Indian Community (including the Santa Rosa Rancheria).	Soboba Band of Luiseño Indians (including the Soboba Reservation).	Torres Martinez Desert Cahuilla Indians (including the Torres-Martinez Reservation)	
Table Mountain Rancheria (including the Table Mountain Rancheria).	Reclassification Deferred for: Morongo Band of Mission Indians (including the Morongo Reservation).	Twenty-Nine Palms Band of Mission Indians (including the Twenty-Nine Palms Reservation-Riverside County Section).	
Tule River Indian Tribe (including the Tule River Reservation).	Reclassification Deferred for: Pechanga Band of Luiseño Mission Indians (including the Pechanga Reservation).		

To codify our final action reclassifying the four subject areas, we are revising the table for 8-hour ozone in 40 CFR 81.305 accordingly.

VI. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this final action is not a "significant regulatory action" and therefore is not subject to Executive Order 12866. With respect to lands under state jurisdiction, voluntary reclassifications under CAA section 181(b)(3) of the CAA are based solely upon requests by the State, and EPA is required under the CAA to grant them. These actions do not, in and of themselves, impose any new requirements on any sectors of the economy. In addition, because the statutory requirements are clearly defined with respect to the differently classified areas, and because those requirements are automatically triggered by reclassification, reclassification does not impose a materially adverse impact under Executive Order 12866. With respect to Indian country, reclassifications do not establish deadlines for air quality plans or plan revisions. For these reasons, this final action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001).

In addition, I certify that this final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), and that this final rule does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), because EPA is required to grant requests by states for voluntary reclassifications and such reclassifications in and of themselves do not impose any federal intergovernmental mandate, and because tribes are not subject to implementation plan submittal deadlines that apply to States as a result of reclassifications.

Executive Order 13175 (65 FR 67249, November 9, 2000) requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." "Policies that have tribal implications" is defined in section 1(a) of the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."

Several Indian tribes have Indian country located within the boundaries of the four subject ozone nonattainment areas. EPA implements federal Clean Air Act programs, including reclassifications, in these areas of Indian country consistent with our discretionary authority under sections 301(a) and 301(d)(4) of the Clean Air Act. EPA has concluded that this final rule might have tribal implications for the purposes of E.O. 13175, but would not impose substantial direct costs upon the tribes, nor would it preempt Tribal law. This final rule does not affect implementation of new source review for new or modified stationary sources proposed to be located in the Indian country areas proposed for reclassification, but might affect projects proposed in these areas that require Federal permits, approvals, or funding. Such projects are subject to the requirements of EPA's General Conformity rule, and Federal permits, approvals, or funding for the projects may be more difficult to obtain because of the lower de minimis thresholds triggered by reclassification.[14]

Given the potential implications, EPA contacted tribal officials early in the process of developing this final rule to provide an opportunity to have meaningful and timely input into its development. On July 31, 2008, we sent letters to leaders of the 22 tribes with Indian country areas in the four subject nonattainment areas seeking their input

[14] As noted in section IV ("Public Comments and EPA Responses"), EPA is deferring the reclassification of the Morongo and Pechanga Reservations pending our final decisions on their boundary change requests. Thus, for the time being, the current General Conformity de minimis thresholds (25 tons per year for VOC or NO_X) continue to apply for projects proposed in the Morongo and Pechanga Reservations that require Federal permits, approvals, or funding.

on how we could best communicate with the tribes on the rulemaking effort.[15] We received responses from nine tribes, of whom four indicated face-to-face meetings as one of several preferred means of communication. Prior to our proposal we had met with two tribes that sought specific meetings on the reclassifications: Morongo Band of Mission Indians ("Morongo Tribe") and Pechanga Band of Luiseño Mission Indians ("Pechanga Tribe"). Following the end of the comment period on our proposal, we met again with the Morongo and Pechanga Tribes to discuss the Tribes' broader requests for separate nonattainment areas. We also contacted the Twenty-Nine Palms Band of Luiseño Mission Indians, and the Santa Rosa Band of Cahuilla Indians to clarify how the reclassification would affect each Tribe's Indian country in Coachella Valley. EPA has carefully considered the views expressed by the Tribes, including (as described in detail above) the views expressed in written comments on EPA's proposed reclassification rule.

This final action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, nor on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This final action does not alter the relationship or the distribution of power and responsibilities established in the CAA.

This final rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because EPA interprets E.O. 13045 as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the E.O. has the potential to influence the regulation.

Reclassification actions do not involve technical standards and thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) also do not apply. In addition, this final rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. This reclassification action relates to ozone, a pollutant that is regional in nature, and is not the type of action that could result in the types of local impacts addressed in Executive Order 12898.

The Congressional Review Act, 5 U.S.C. section 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. section 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 6, 2010. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* CAA section 307(b)(2).)

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, Intergovernmental relations, National parks, Ozone, Wilderness areas.

Dated: April 15, 2010.

Jared Blumenfeld,

Regional Administrator, Region IX.

■ Part 81, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 81—[AMENDED]

■ 1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart C—[Amended]

■ 2. Section 81.305 is amended in the table for "California—Ozone (8–Hour Standard)" by revising the entries for "Los Angeles-South Coast Air Basin, CA," "Riverside Co. (Coachella Valley), CA," "Sacramento Metro, CA," and "San Joaquin Valley, CA,"; by republishing footnotes "a", "b", and "1"; by adding footnotes "c" and "2"; and by designating the footnotes in the correct order to read as follows:

§ 81.305 California.

CALIFORNIA—OZONE (8-HOUR STANDARD)

Designated area	Designation[a]		Classification	
	Date[1]	Type	Date[1]	Type
* * * *	*		*	*
Los Angeles—South Coast Air Basin, CA	.....	Nonattainment	(2)	Subpart 2/Extreme.
Los Angeles County (part)	.....	Nonattainment	(2)	Subpart 2/Extreme.

[15] In our proposed rule, we indicated that we sent letters to the leaders of 21 tribes with Indian country areas in the four subject nonattainment areas. On July 31, 2008 we had also sent a letter to the leader of the Twenty-Nine Palms Band of Luiseño Mission Indians in relation to the Tribe's Indian country located within the Western Mojave Desert nonattainment area, for which the State of California has also submitted a reclassification request but for which we have deferred action. This Tribe is affected by this final action in relation to its Indian country in the Coachella Valley nonattainment area.

CALIFORNIA—OZONE (8-HOUR STANDARD)—Continued

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [1]	Type
That portion of Los Angeles County which lies south and west of a line described as follows: Beginning at the Los Angeles-San Bernardino County boundary and running west along the Township line common to Township 3 North and Township 2 North, San Bernardino Base and Meridian; then north along the range line common to Range 8 West and Range 9 West; then west along the Township line common to Township 4 North and Township 3 North; then north along the range line common to Range 12 West and Range 13 West to the southeast corner of Section 12, Township 5 North and Range 13 West; then west along the south boundaries of Sections 12, 11, 10, 9, 8, and 7, Township 5 North and Range 13 West to the boundary of the Angeles National Forest which is collinear with the range line common to Range 13 West and Range 14 West; then north and west along the Angeles National Forest boundary to the point of intersection with the Township line common to Township 7 North and Township 6 North (point is at the northwest corner of Section 4 in Township 6 North and Range 14 West); then west along the Township line common to Township 7 North and Township 6 North; then north along the range line common to Range 15 West and Range 16 West to the southeast corner of Section 13, Township 7 North and Range 16 West; then along the south boundaries of Sections 13, 14, 15, 16, 17, and 18, Township 7 North and Range 16 West; then north along the range line common to Range 16 West and Range 17 West to the north boundary of the Angeles National Forest (collinear with the Township line common to Township 8 North and Township 7 North); then west and north along the Angeles National Forest boundary to the point of intersection with the south boundary of the Rancho La Liebre Land Grant; then west and north along this land grant boundary to the Los Angeles-Kern County boundary.				
Orange County	.....	Nonattainment	(2)	Subpart 2/Extreme.
Riverside County (part)	.....	Nonattainment	(2)	Subpart 2/Extreme.
That portion of Riverside County, except that portion of the area defined below that lies within the Morongo Reservation or the Pechanga Reservation [c], which lies to the west of a line described as follows: Beginning at the Riverside-San Diego County boundary and running north along the range line common to Range 4 East and Range 3 East, San Bernardino Base and Meridian; then east along the Township line common to Township 8 South and Township 7 South; then north along the range line common to Range 5 East and Range 4 East; then west along the Township line common to Township 6 South and Township 7 South to the southwest corner of Section 34, Township 6 South, Range 4 East; then north along the west boundaries of Sections 34, 27, 22, 15, 10, and 3, Township 6 South, Range 4 East; then west along the Township line common to Township 5 South and Township 6 South; then north along the range line common to Range 4 East and Range 3 East; then west along the south boundaries of Sections 13, 14, 15, 16, 17, and 18, Township 5 South, Range 3 East; then north along the range line common to Range 2 East and Range 3 East; to the Riverside-San Bernardino County line.				
Morongo Reservation [c]	.....	Nonattainment	(2)	Subpart 2/Severe-17.
Pechanga Reservation [c]	.....	Nonattainment	(2)	Subpart 2/Severe-17.
San Bernardino County (part)	.....	Nonattainment	(2)	Subpart 2/Extreme.
That portion of San Bernardino County which lies south and west of a line described as follows: Beginning at the San Bernardino-Riverside County boundary and running north along the range line common to Range 3 East and Range 2 East, San Bernardino Base and Meridian; then west along the Township line common to Township 3 North and Township 2 North to the San Bernardino-Los Angeles County boundary.				
.				
* * * *	*		*	*
Riverside Co. (Coachella Valley), CA	.....	Nonattainment	(2)	Subpart 2/Severe-15.
Riverside County (part)	.....	Nonattainment	(2)	Subpart 2/Severe-15.

CALIFORNIA—OZONE (8-HOUR STANDARD)—Continued

Designated area	Designation [a]		Classification	
	Date [1]	Type	Date [1]	Type
That portion of Riverside County which lies to the east of a line described as follows: Beginning at the Riverside-San Diego County boundary and running north along the range line common to Range 4 East and Range 3 East, San Bernardino Base and Meridian; then east along the Township line common to Township 8 South and Township 7 South; then north along the range line common to Range 5 East and Range 4 East; then west along the Township line common to Township 6 South and Township 7 South to the southwest corner of Section 34, Township 6 South, Range 4 East; then north along the west boundaries of Sections 34, 27, 22, 15, 10, and 3, Township 6 South, Range 4 East; then west along the Township line common to Township 5 South and Township 6 South; then north along the range line common to Range 4 East and Range 3 East; then west along the south boundaries of Sections 13, 14, 15, 16, 17, and 18, Township 5 South, Range 3 East; then north along the range line common to Range 2 East and Range 3 East; to the Riverside-San Bernardino County line. And that portion of Riverside County which lies to the west of a line described as follows:				
That segment of the southwestern boundary line of Hydrologic Unit Number 18100100 within Riverside County, further described as follows: Beginning at the Riverside-Imperial County boundary and running north along the range line common to Range 17 East and Range 16 East, San Bernardino Base and Meridian; then northwest along the ridge line of the Chuckwalla Mountains, through Township 8 South, Range 16 East and Township 7 South, Range 16 East, until the Black Butte Mountain, elevation 4504′; then west and northwest along the ridge line to the southwest corner of Township 5 South, Range 14 East; then north along the range line common to Range 14 East and Range 13 East; then west and northwest along the ridge line to Monument Mountain, elevation 4834′; then southwest and then northwest along the ridge line of the Little San Bernardino Mountains to Quail Mountain, elev. 5814′; then northwest along the ridge line to the Riverside-San Bernardino County line.				
* * * *		*	*	*
Sacramento Metro, CA	.....	Nonattainment	(2)	Subpart 2/Severe-15.
El Dorado County (part)	.....	Nonattainment	(2)	Subpart 2/Severe-15.
All portions of the county, except that portion of El Dorado County within the drainage area naturally tributary to Lake Tahoe including said Lake.				
Placer County (part)	.....	Nonattainment	(2)	Subpart 2/Severe-15.
All portions of the county except that portion of Placer County within the drainage area naturally tributary to Lake Tahoe including said Lake, plus that area in the vicinity of the head of the Truckee River described as follows: Commencing at the point common to the aforementioned drainage area crestline and the line common to Townships 15 North and 16 North, Mount Diablo Base and Meridian, and following that line in a westerly direction to the northwest corner of Section 3, Township 15 North, Range 16 East, Mount Diablo Base and Meridian, thence south along the west line of Sections 3 and 10, Township 15 North, Range 16 East, Mount Diablo Base and Meridian, to the intersection with the said drainage area crestline, thence following the said drainage area boundary in a southeasterly, then northeasterly direction to and along the Lake Tahoe Dam, thence following the said drainage area crestline in a northeasterly, then northwesterly direction to the point of beginning.				
Sacramento County	.....	Nonattainment	(2)	Subpart 2/Severe-15.
Solano County (part)	.....	Nonattainment	(2)	Subpart 2/Severe-15.

CALIFORNIA—OZONE (8-HOUR STANDARD)—Continued

Designated area	Designation[a]		Classification	
	Date[1]	Type	Date[1]	Type
That portion of Solano County which lies north and east of a line described as follows: Beginning at the intersection of the westerly boundary of Solano County and the ¼ section line running east and west through the center of Section 34; Township 6 North, Range 2 West, Mount Diablo Base and Meridian, thence east along said ¼ section line to the east boundary of Section 36, Township 6 North, Range 2 West, thence south ½ mile and east 2.0 miles, more or less, along the west and south boundary of Los Putos Rancho to the northwest corner of Section 4, Township 5 North, Range 1 West, thence east along a line common to Township 5 North and Township 6 North to the northeast corner of Section 3, Township 5 North, Range 1 East, thence south along section lines to the southeast corner of Section 10, Township 3 North, Range 1 East, thence east along section lines to the south ¼ corner of Section 8, Township 3 North, Range 2 East, thence east to the boundary between Solano and Sacramento Counties.				
Sutter County (part)	.....	Nonattainment	(2)	Subpart 2/Severe-15.
Portion south of a line connecting the northern border of Yolo County to the SW tip of Yuba County and continuing along the southern Yuba County border to Placer County.				
Yolo County	.....	Nonattainment	(2)	Subpart 2/Severe-15.
* * * *		*	*	*
San Joaquin Valley, CA	.....	Nonattainment	(2)	Subpart 2/Extreme.
Fresno County	.....	Nonattainment	(2)	Subpart 2/Extreme.
Kern County (part)	.....	Nonattainment	(2)	Subpart 2/Extreme.
That portion of Kern County which lies west and north of a line described as follows: Beginning at the Kern-Los Angeles County boundary and running north and east along the northwest boundary of the Rancho La Libre Land Grant to the point of intersection with the range line common to R. 16 W. and R. 17 W., San Bernardino Base and Meridian; north along the range line to the point of intersection with the Rancho El Tejon Land Grant boundary; then southeast, northeast, and northwest along the boundary of the Rancho El Tejon Land Grant to the northwest corner of S. 3, T. 11 N., R. 17 W.; then west 1.2 miles; then north to the Rancho El Tejon Land Grant boundary; then northwest along the Rancho El Tejon line to the southeast corner of S. 34, T. 32 S., R. 30 E., Mount Diablo Base and Meridian; then north to the northwest corner of S. 35, T. 31 S., R. 30 E.; then northeast along the boundary of the Rancho El Tejon Land Grant to the southwest corner of S. 18, T. 31 S., R. 31 E.; then east to the southeast corner of S. 13, T. 31 S., R. 31 E.; then north along the range line common to R. 31 E. and R. 32 E., Mount Diablo Base and Meridian, to the northwest corner of S. 6, T. 29 S., R. 32 E.; then east to the southwest corner of S. 31, T. 28 S., R. 32 E.; then north along the range line common to R. 31 E. and R. 32 E. to the northwest corner of S. 6, T. 28 S., R. 32 E., then west to the southeast corner of S. 36, T. 27 S., R. 31 E., then north along the range line common to R. 31 E. and R. 32 E. to the Kern-Tulare County boundary.				
Kings County	.....	Nonattainment	(2)	Subpart 2/Extreme.
Madera County	.....	Nonattainment	(2)	Subpart 2/Extreme.
Merced County	.....	Nonattainment	(2)	Subpart 2/Extreme.
San Joaquin County	.....	Nonattainment	(2)	Subpart 2/Extreme.
Stanislaus County	.....	Nonattainment	(2)	Subpart 2/Extreme.
Tulare County	.....	Nonattainment	(2)	Subpart 2/Extreme.
* * * *		*	*	*

[a] Includes Indian Country located in each county or area, except as otherwise specified.

[b] The boundaries for these designated areas are based on coordinates of latitude and longitude derived from EPA Region 9's GIS database and are illustrated in a map entitled "Eastern San Diego County Attainment Areas for the 8-Hour Ozone NAAQS," dated March 9, 2004, including an attached set of coordinates. The map and attached set of coordinates are available at EPA's Region 9 Air Division office. The designated areas roughly approximate the boundaries of the reservations for these tribes, but their inclusion in this table is intended for CAA planning purposes only and is not intended to be a federal determination of the exact boundaries of the reservations. Also, the specific listing of these tribes in this table does not confer, deny, or withdraw Federal recognition of any of the tribes so listed nor any of the tribes not listed.

[c] The use of reservation boundaries for this designation is for purposes of CAA planning only and is not intended to be a federal determination of the exact boundaries of the reservations. Nor does the specific listing of the Tribes in this table confer, deny, or withdraw Federal recognition of any of the Tribes listed or not listed.

[1] This date is June 15, 2004, unless otherwise noted.
[2] This date is June 4, 2010.

* * * * *

[FR Doc. 2010–9599 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0611; FRL–8821–4]

Tebuconazole; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of tebuconazole in or on vegetable, fruiting, group 8. Bayer CropScience requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective May 5, 2010. Objections and requests for hearings must be received on or before July 6, 2010, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0611. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Tracy Keigwin, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–6605; e-mail address: *keigwin.tracy @epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Electronic Access to Other Related Information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR cite at *http://www.gpoaccess.gov/ecfr*. To access the harmonized test guidelines referenced in this document electronically, please go to *http://www.epa.gov/oppts* and select "Test Methods and Guidelines."

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0611 in the subject line on the first page of your submission. All requests must be in writing, and must be mailed or delivered to the Hearing Clerk as required by 40 CFR part 178 on or before July 6, 2010.

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2009–0611, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of September 4, 2009 (74 FR 45848) (FRL–8434–4), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 9F7515) by Bayer CropScience, 2 T.W. Alexander Dr., P.O. Box 12014, Research Triangle Park, NC 27709. The petition requested that 40 CFR part 180 be amended by establishing tolerances for residues of the fungicide tebuconazole in or on the raw agricultural commodity vegetables, fruiting, group at 1.4 parts per million (ppm). That notice referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available to the public in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified the proposed tolerance to 1.3 ppm. The reason for this change is explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . ."

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for the petitioned-for tolerances for residues of tebuconazole on vegetables, fruiting, group 8 at 1.3 ppm. EPA's assessment of exposures and risks associated with establishing tolerances follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Tebuconazole has low acute toxicity by the oral or dermal route of exposure, and moderate toxicity by the inhalation route. It is not a dermal sensitizer or a dermal irritant; however, it is slightly to mildly irritating to the eye. The main target organs are the liver, the adrenals, the hematopoetic system and the nervous system. Effects on these target organs were seen in both rodent and non-rodent species. In addition, ocular lesions are seen in dogs (including lenticular degeneration and increased cataract formation) following subchronic or chronic exposure.

Oral administration of tebuconazole caused developmental toxicity in all species evaluated (rat, rabbit, and mouse), with the most prominent effects seen in the developing nervous system. In the available toxicity studies on tebuconazole, there was no toxicologically significant evidence of endocrine disruptor effects. Tebuconazole was classified as a Group C possible human carcinogen, based on an increase in the incidence of hepatocellular adenomas, carcinomas and combined adenomas/carcinomas in male and female mice. Submitted mutagenicity studies did not demonstrate any evidence of mutagenic potential for tebuconazole.

Specific information on the studies received and the nature of the adverse effects caused by tebuconazole as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document entitled "Tebuconazole: Human Health Risk Assessment to support tolerances in/on Asparagus, Barley, Beans, Beets, Brassica leafy greens, Bulb Vegetables, Coffee (import), Commercial Ornamentals, Corn, Cotton, Cucurbits, Hops, Lychee, Mango, Okra, Pome fruit, Soybean, Stone fruit, Sunflower, Tree Nut Crop Group, Turf, Turnips and Wheat," pages 83–105 in docket ID number EPA–HQ–OPP–2005–0097–0004.

B. Toxicological Endpoints

For hazards that have a threshold below which there is no appreciable risk, a toxicological point of departure (POD) is identified as the basis for derivation of reference values for risk assessment. The POD may be defined as the highest dose at which no adverse effects are observed (the NOAEL) in the toxicology study identified as appropriate for use in risk assessment. However, if a NOAEL cannot be determined, the lowest dose at which adverse effects of concern are identified (the LOAEL) or a benchmark dose (BMD) approach is sometimes used for risk assessment. Uncertainty/safety factors (UFs) are used in conjunction with the POD to take into account uncertainties inherent in the extrapolation from laboratory animal data to humans and in the variations in sensitivity among members of the human population as well as other unknowns. Safety is assessed for acute and chronic dietary risks by comparing aggregate food and water exposure to the pesticide to the acute population adjusted dose (aPAD) and chronic population adjusted dose (cPAD). The aPAD and cPAD are calculated by dividing the POD by all applicable UFs. Aggregate short-, intermediate-, and chronic-term risks are evaluated by comparing food, water, and residential exposure to the POD to ensure that the margin of exposure (MOE) called for by the product of all applicable UFs is not exceeded. This latter value is referred to as the level of concern (LOC).

For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect greater than that expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for tebuconazole used for human risk assessment is shown in the Table of this unit.

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR TEBUCONAZOLE FOR USE IN HUMAN RISK ASSESSMENT

Exposure/Scenario	Point of Departure and Uncertainty/ Safety Factors	RfD, PAD, LOC for Risk Assessment	Study and Toxicological Effects
Acute dietary (General population including infants and children, Females 13–50 years of age)	LOAEL = 8.8 milligram/kilogram/day (mg/kg/day) UF = 300 UF_A = 10x UF_H = 10x FQPA (UF_L) = 3x	Acute RfD = 0.029 mg/kg/day aPAD = 0.029 mg/kg/day	Developmental Neurotoxicity Study – Rat. LOAEL = 8.8 mg/kg/day based on decreases in body weights, absolute brain weights, brain measurements and motor activity in offspring.
Chronic dietary (All populations)	LOAEL = 8.8 mg/kg/day UF = 300 UF_A = 10x UF_H = 10x FQPA (UF_L) = 3x	Chronic RfD = 0.029 mg/kg/day cPAD = 0.029 mg/kg/day	Developmental Neurotoxicity Study – Rat. LOAEL = 8.8 mg/kg/day based on decreases in body weights, absolute brain weights, brain measurements and motor activity in offspring.
Incidental oral short term/Intermediate term (1 to 30 days/1–6 months)	LOAEL = 8.8 mg/kg/day UF = 300 UF_A = 10x UF_H = 10x FQPA (UF_L) = 3x	Residential LOC for MOE = 300	Developmental Neurotoxicity Study – Rat. LOAEL = 8.8 mg/kg/day based on decreases in body weights, absolute brain weights, brain measurements and motor activity in offspring.
Dermal short term/Intermediate term (1 to 30 days/1 to 6 months)	LOAEL = 8.8 mg/kg/day UF = 300 UF_A = 10x UF_H = 10x UF_L = 3x DAF = 23.1%	Residential LOC for MOE = 300	Developmental Neurotoxicity Study –Rat. LOAEL = 8.8 mg/kg/day based on decreases in body weights, absolute brain weights, brain measurements and motor activity in offspring.
Inhalation short term/Intermediate term (1 to 30 days/1 to 6 months)	LOAEL = 8.8 mg/kg/day UF = 300 UF_A = 10x UF_H = 10x UF_L = 3x Inhalation and oral toxicity are assumed to be equivalent	Residential LOC for MOE = 300	Developmental Neurotoxicity Study – Rat. LOAEL = 8.8 mg/kg/day based on decreases in body weights, absolute brain weights, brain measurements and motor activity in offspring.
Cancer (Oral, dermal, inhalation)	Classification: Group C–possible human carcinogen based on statistically significant increase in the incidence of hepatocellular adenoma, carcinoma, and combined adenoma/carcinomas in both sexes of NMRI mice. Considering that there was no evidence of carcinogenicity in rats, there was no evidence of genotoxicity for tebuconazole, and tumors were only seen at a high and excessively toxic dose in mice, EPA concluded that the chronic RfD would be protective of any potential carcinogenic effect. The chronic RfD value is 0.029 mg/kg/day which is approximately 9,600 fold lower than the dose that would induce liver tumors (279 mg/kg/day).		

UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies). UF_L = use of a LOAEL to extrapolate a NOAEL. UF_S = use of a short-term study for long-term risk assessment. UF_{DB} = to account for the absence of data or other data deficiency. FQPA SF = Food Quality Protection Act Safety Factor. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. MOE = margin of exposure. LOC = level of concern.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to tebuconazole, EPA considered exposure under the petitioned-for tolerances as well as all existing tebuconazole tolerances in 40 CFR 180.474. EPA assessed dietary exposures from tebuconazole in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure.

In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, anticipated residues for bananas, grapes, raisins, nectarines, peaches, peanut butter and wheat were derived using the latest USDA Pesticide Data Program (PDP) monitoring data. Anticipated residues for all other registered and proposed food commodities were based on field trial data. For uses associated with PP 9F7515, 100 percent crop treated (PCT) was assumed. Dietary Exposure Evaluation Model (ver. 7.81) default processing factors were assumed for processed commodities associated with petition 9F7515. For several other uses

EPA used PCT data as specified in Unit III.C.1.iv.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the same assumptions as stated in Unit III.C.1.i. for acute exposure.

iii. *Cancer*. As explained in Unit III.B., the chronic risk assessment is considered to be protective of any cancer effects; therefore, a separate quantitative cancer dietary risk assessment was not conducted.

iv. *Anticipated residue and PCT information*. Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to section 408(f)(1) of FFDCA that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by section 408(b)(2)(E) of FFDCA and authorized under section 408(f)(1) of FFDCA. Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- Condition b: The exposure estimate does not underestimate exposure for any significant subpopulation group.
- Condition c: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by section 408(b)(2)(F) of FFDCA, EPA may require registrants to submit data on PCT.

The Agency used PCT information as follows:

Grapes: 25%; grape, raisin: 25%; nectarine 25%; oats 2.5%; peach: 20%; and peanuts 45%.

In most cases, EPA uses available data from the USDA's National Agricultural Statistics Service (NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency used projected percent crop treated (PPCT) information for tebuconazole on apples, apricots, cherries (preharvest), sweetcorn, hops, plums, and turnips. The PPCT for each crop is as follows: Apples, acute assessment 44%, chronic assessment 41%; apricots: acute assessment 56%, chronic assessment 43%; cherries, preharvest: acute assessment 42%, chronic assessment 37%; corn, sweet: acute assessment 22%, chronic assessment 14%; hops: acute assessment 64%, chronic assessment 64%; plum: acute assessment 26%, chronic assessment 24%; turnip: acute assessment 68%, chronic assessment 44%. EPA estimates PPCT for a new pesticide use by assuming that its actual PCT during the initial 5 years of use on a specific use site will not exceed the recent PCT of the market leader (i.e., the one with the greatest PCT) on that site. An average market leader PCT, based on three recent surveys of pesticide usage, if available, is used for chronic risk assessment, while the maximum PCT from the same three recent surveys, if available, is used for acute risk assessment. The average and maximum market leader PCTs may each be based on one or two surveys if three are not available. Comparisons are only made among pesticides of the same pesticide types (i.e., the leading fungicide on the use site is selected for comparison with the new fungicide). The market leader PCTs used to determine the average and the maximum may be each for the same pesticide or for different pesticides since the same or different pesticides may dominate for each year. Typically, EPA uses USDA/NASS as the source for raw PCT data because it is publicly available. When a specific use site is not surveyed by USDA/NASS, EPA uses other sources including proprietary data.

An estimated PPCT, based on the average PCT of the market leaders, is appropriate for use in chronic dietary risk assessment, and an estimated PPCT, based on the maximum PCT of the market leaders, is appropriate for use in acute dietary risk assessment. This method of estimating PPCTs for a new use of a registered pesticide or a new pesticide produces high-end estimates that are unlikely, in most cases, to be exceeded during the initial 5 years of actual use. Predominant factors that bear on whether the PPCTs could be exceeded may include PCTs of similar chemistries, pests controlled by alternatives, pest prevalence in the market and other factors. All relevant information currently available for predominant factors have been considered for tebuconazole on cherries, resulting in adjustments to the initial estimates for three crops to account for lack of confidence in projections based on less than three observations, old data and/or data based on expert opinion.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which tebuconazole may be applied in a particular area.

2. *Dietary exposure from drinking water*. The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for tebuconazole in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of tebuconazole. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI GROW) models, the estimated drinking water concentrations (EDWCs) of tebuconazole for acute exposures are estimated to be 47.23 micrograms/Liter (µg/L) for surface water and 0.447 µg/L for ground water. The EDWCs for chronic, noncancer are estimated to be 16.97 µg/L for surface water and 0.447 µg/L for ground water. The EDWCs for chronic, cancer exposures are estimated to be 12.14 for surface water and 0.447 µg/L for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model. For the acute dietary risk assessment, the water concentration value of 47.23 µg/L was used to assess the contribution to drinking water. For the chronic dietary risk assessment (which is protective of any possible cancer effects), the water concentration value of 16.97 µg/L was used to assess the contribution to drinking water.

3. *From non-dietary exposure*. The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Tebuconazole has currently registered uses that could result in residential exposures. Short term dermal and inhalation exposures are possible for residential adult handlers mixing, loading, and applying tebuconazole products outdoors to ornamental plants. Short- and intermediate-term dermal postapplication exposures to adults and children are also possible during golfing and/or playing on treated wood structures. Children may also be exposed via the incidental oral route when playing on treated wood structures. Long-term exposure is not expected. As a result, risk assessments have been completed for residential handler scenarios as well as residential post-application scenarios.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

Tebuconazole is a member of the triazoles (and more specifically, triazole-derivative fungicides). Although triazoles act similarly in plants (fungi) by inhibiting ergosterol biosynthesis, there is not necessarily a relationship between their pesticidal activity and their mechanism of toxicity in mammals. Structural similarities do not constitute a common mechanism of toxicity. Evidence is needed to establish that the chemicals operate by the same, or essentially the same, sequence of major biochemical events. In triazole-derivative fungicides, however, a variable pattern of toxicological responses is found: Some are hepatotoxic and hepatocarcinogenic in mice; some induce thyroid tumors in rats; and some induce developmental, reproductive, and neurological effects in rodents. Furthermore, the triazoles produce a diverse range of biochemical events including altered cholesterol levels, stress responses, and altered DNA methylation. It is not clearly understood whether these biochemical events are directly connected to their toxicological outcomes. Thus, there is currently no evidence to indicate that triazole-derivative fungicides share common mechanisms of toxicity and EPA is not following a cumulative risk approach based on a common mechanism of toxicity for the triazole-derivative fungicides. For information regarding EPA's procedures for cumulating effects from substances found to have a common mechanism of toxicity, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

However, the triazole-derivative fungicides can form the common metabolites 1,2,4-triazole and conjugated triazole metabolites. To support existing tolerances and to establish new tolerances for triazole-derivative fungicides, including tebuconazole, EPA conducted a human health risk assessment for exposure to 1,2,4-triazole, triazolylalanine, and triazolylacetic acid resulting from the use of all current and pending uses of any triazole-derivative fungicide. The risk assessment is a highly conservative, screening-level evaluation in terms of hazards associated with common metabolites (e.g., use of a maximum combination of uncertainty factors) and potential dietary and non-dietary exposures (i.e., high end estimates of both dietary and non-dietary exposures). In addition, the Agency retained the additional 10x the Food Quality Protection Act (FQPA) Safety Factor (SF) for the protection of infants and children. The assessment includes evaluations of risks for various subgroups, including those comprised of infants and children. The Agency's complete risk assessment is found in the propiconazole reregistration docket at *http://www.regulations.gov*, docket ID number EPA–HQ–OPP–2005–0497.

In connection with the pending new uses of tebuconazole (and other triazole-derivative fungicides), the Agency has revised the triazole dietary assessment to include the new uses of tebuconazole and has determined that aggregate risk (food, water and residential) remains below the Agency's level of concern. This revised assessment can be found at *http://www.regulations.gov* in docket ID EPA–HQ–OPP–2009–0061.

D. Safety Factor for Infants and Children

1. *In general*. Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10x) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as FQPA SF. In applying this provision, EPA either retains the default value of 10x, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*. The toxicity database for tebuconazole is complete, and includes prenatal developmental toxicity studies in three species (mouse, rat, and rabbit), a reproductive toxicity study in rats, acute and subchronic neurotoxicity studies in rats, and a developmental neurotoxicity study in rats. The data from prenatal developmental toxicity studies in mice and a developmental neurotoxicity study in rats indicated an increased quantitative and qualitative susceptibility following *in utero* exposure to tebuconazole. The NOAELs/LOAELs for developmental toxicity in these studies were found at dose levels less than those that induce maternal toxicity or in the presence of slight maternal toxicity. There was no indication of increased quantitative susceptibility in the rat and rabbit developmental toxicity studies, the NOAELs for developmental toxicity were comparable to or higher than the NOAELs for maternal toxicity. In all three species, however, there was indication of increased qualitative susceptibility. For most studies, minimal maternal toxicity was seen at the LOAEL (consisting of increases in hematological findings in mice, increased liver weights in rabbits and rats, and decreased body weight gain/food consumption in rats) and did not

increase substantially in severity at higher doses; however, there was more concern for the developmental effects at each LOAEL which included increases in runts, increased fetal loss, and malformations in mice, increased skeletal variations in rats, and increased fetal loss and frank malformations in rabbits. Additionally, more severe developmental effects (including frank malformations) were seen at higher doses in mice, rats and rabbits. In the developmental neurotoxicity study, maternal toxicity was seen only at the high dose (decreased body weights, body weight gains, and food consumption, prolonged gestation with mortality, and increased number of dead fetuses), while offspring toxicity (including decreases in body weight, brain weight, brain measurements and functional activities) was seen at all doses.

Available data indicated greater sensitivity of the developing organism to exposure to tebuconazole, as demonstrated by increases in qualitative sensitivity in prenatal developmental toxicity studies in rats, mice, and rabbits, and by increases in both qualitative and quantitative sensitivity in the developmental neurotoxicity study in rats with tebuconazole. However, the degree of concern is low because the toxic endpoints in the prenatal developmental toxicity studies were well characterized with clear NOAELs established and the most sensitive endpoint from the developmental neurotoxicity study is used for overall risk assessments. Therefore, there are no residual uncertainties for prenatal and/or postnatal susceptibility.

There is a concern with regard to the DNT study because of the failure to achieve a NOAEL in that study. This concern is addressed by the retention of FQPA SF in the form of UF_L of 3x. Reduction of the FQPA safety factor from 10x to 3x is based on a Benchmark Dose (BMD) analysis of the datasets relevant to the adverse offspring effects (decreased body weight, decreases in absolute brain weights, changes in brain morphometric parameters, and decreases in motor activity) seen at the LOAEL in the DNT study. All of the BMDLs (the lower limit of a one-sided 95% confidence interval on the BMD) modeled successfully on statistically significant effects are 1–2x lower than the LOAEL. The results indicate that the extrapolated NOAEL is not likely to be 10x lower than the LOAEL and that the use of the FQPA SF of 3x would not underestimate risk. Using a 3x FQPA SF in the risk assessment (8.8 mg/kg/day ÷ 3x = 2.9 mg/kg/day) is further supported by the NOAELs established in other studies in the tebuconazole toxicity database [i.e., 3 and 2.9 mg/kg/day, from a developmental toxicity study in mice and a chronic toxicity study in dogs, respectively (respective LOAELs 10 and 4.5 mg/kg/day)].

3. *Conclusion*. The Agency has determined that reliable data show that it would be safe for infants and children to reduce the FQPA SF to 3x for all potential exposure scenarios. That decision is based on the following findings:

i. The toxicity database for tebuconazole is complete with the exception of an immunotoxicity study requirement under the new 40 CFR part 158 guidelines for toxicity data. The available guideline studies do not suggest that tebuconazole directly targets the immune system. A peer-reviewed developmental neurotoxicity/immunotoxicity literature study (Moser et al., 2001) found in high dose groups (60 mg/kg/day) increased spleen weights and alterations in splenic lymphocyte subpopulations. At the same dose there were no effects seen in the T-cell dependent antibody response to SRBC (sheep red blood cells) and natural killer (NK) cell activity indicating that tebuconazole did not alter the functional immune response in rats. Based on guideline and open literature, the overall weight of evidence suggests that tebuconazole does not directly target the immune system. The Agency does not believe that conducting a functional immunotoxicity study will result in a lower POD than currently used for overall risk assessment; therefore, a database uncertainty factor (UFDB) is not needed to account for the lack of the study.

ii.Although there is qualitative evidence of increased susceptibility in the prenatal developmental studies in rats, the risk assessment team did not identify any residual uncertainties after establishing toxicity endpoints and traditional UFs to be used in the risk assessment of tebuconazole. The degree of concern for residual uncertainties for prenatal and/or postnatal toxicity is low.

iii.The FQPA SF is retained as a UF_L. Reduction of the UF_L from 10 to 3x is based on a BMD analyses of the datasets relevant to the adverse offspring effects (decreased body weight and brain weight) seen at the LOAEL in the DNT study. All of the BMDLs modeled successfully on statistically significant effects are 1–2x lower than the LOAEL. The results indicate that an extrapolated NOAEL is not likely to be 10x lower than the LOAEL and that use of an UF_L of 3x would not underestimate risk. Using an UF_L of 3x in risk assessment (8.8 mg/kg/day ÷ 3x = 2.9 mg/kg/day) is further supported by other studies in the tebuconazole toxicity database [with the lowest NOAELs being 3 and 2.9 mg/kg/day, from a developmental toxicity study in mice and a chronic toxicity study in dogs, respectively (respective LOAELs 10 and 4.5 mg/kg/day)].

iv.There are no residual uncertainties identified in the exposure databases. Although the acute and chronic food exposure assessments are refined, EPA believes that the assessments are based on reliable data and will not underestimate exposure/risk. The drinking water estimates were derived from conservative screening models. The residential exposure assessment utilizes reasonable high-end variables set out in EPA's Occupational/Residential Exposure SOPs (Standard Operating Procedures). The aggregate assessment is based upon reasonable worst-case residential assumptions, and is also not likely to underestimate exposure/risk to any subpopulation, including those comprised of infants and children.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic pesticide exposures are safe by comparing aggregate exposure estimates to the aPAD and cPAD. The aPAD and cPAD represent the highest safe exposures, taking into account all appropriate SFs. EPA calculates the aPAD and cPAD by dividing the POD by all applicable UFs. For linear cancer risks, EPA calculates the probability of additional cancer cases given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the POD to ensure that the MOE called for by the product of all applicable UFs is not exceeded.

1. *Acute risk*. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to tebuconazole will occupy 56% of the aPAD for the population group (children 3–5 years old) receiving the greatest exposure.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that exposure to tebuconazole from food and water will utilize 4.9% of the cPAD for the U.S. population and 7.5% of the cPAD for the most highly exposed population group (children 1–2 years old).

3. *Short-term risk*. Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Tebuconazole is currently registered for uses that could result in short-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to tebuconazole.

Using the exposure assumptions described in this unit for short term exposures, EPA has concluded that the short-term aggregate MOE from dietary exposure (food + drinking water) and non-occupational/residential handler exposure for adults using a hose-end sprayer on ornamentals is 390. The short-term aggregate MOE from dietary exposure and exposure from golfing is 1,700. The short-term aggregate MOE to children from dietary exposure and exposure from wood surfaces treated at the above ground use rate is 520. The short-term aggregate MOE to children from dietary exposure and exposure to wood surfaces treated at the below ground use rate is 230. The combined and aggregate MOEs for wood treated for below ground uses exceed the Agency's LOC, and indicate a potential risk of concern. However, the combined MOE for wood treated for above-ground uses does not exceed the LOC, and therefore is not of concern. Exposure to above-ground wood is expected to more closely represent actual exposures to children. Frequency of exposures to above-ground wood should greatly exceed any exposures to below-ground wood, and exposures to below ground wood would be minimal, or negligible. It is unrealistic to expect a full duration of exposure to below ground wood. Therefore, this assessment should be characterized as a conservative screening-level assessment.

4. *Intermediate-term risk*. Intermediate-term aggregate exposure takes into account intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level). Tebuconazole is currently registered for uses that could result in intermediate-term residential exposure and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to tebuconazole. Since the POD, relevant exposure scenarios and exposure assumptions used for intermediate-term aggregate risk assessments are the same as those used for short-term aggregate risk assessments, the short-term aggregate risk assessments represent and are protective of both short- and intermediate-term exposure durations.

5. *Aggregate cancer risk for U.S. population*. As discussed in this unit, the chronic risk assessment is considered to be protective of any cancer effects; therefore, because the chronic risk assessment indicates exposure is lower than the cPAD, tebuconazole does not pose a cancer risk of concern.

6. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to tebuconazole residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate gas chromatography/nitrogen phosphorus detector (GC/NPD) and liquid chromatography/mass spectrometry (LC/MS/MS) methods are available for both collecting and enforcing tolerances for tebuconazole and its metabolites in plant commodities, livestock matrices and processing studies. The methods have been adequately validated by an independent laboratory in conjunction with a previous petition. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov*.

B. International Residue Limits

Codex and Canada have established maximum residue limits (MRLs) for tebuconazole in/on a variety of plant and livestock commodities. The tolerance expression for tebuconazole is harmonized between the United States, Codex, and Canada. There are currently no established Codex, Canadian, or Mexican MRLs for tebuconazole on fruiting vegetables. However, there are CODEX MRLs for chili pepper at 5 ppm and sweet pepper and tomato at 0.5 ppm. The Codex MRLs are based on European field trials, where the single application rate is approximately equivalent to the U.S. single application rate but the pre-harvest interval (PHI) is 3 days in the European Union as opposed to a PHI of 0 days in the United States. Given these different use practices, international harmonization is not possible at this time.

C. Revisions to Petitioned-For Tolerances

Based upon review of the data supporting the petition, EPA determined that the proposed tolerances for vegetable, fruiting, group 8, should be reduced to 1.3 ppm from 1.4 ppm. EPA revised these tolerance levels based on analysis of the residue field trial data using the Agency's "Tolerance Spreadsheet" in accordance with the Agency's "Guidance for Setting Pesticide Tolerances Based on Field Trial Data Standard Operating Procedure (SOP)."

V. Conclusion

Therefore, tolerances are established for residues of the fungicide tebuconazole, including its metabolites and degradates, in or on vegetable, fruiting, group 8 at 1.3 ppm Compliance with the tolerance levels specified in Unit IV.C. is to be determined by measuring only tebuconazole (alpha-[2-(4-chlorophenyl)ethyl]-alpha-(1,1-dimethylethyl)-1*H*-1,2,4-triazole-1-ethanol), in or on vegetable, fruiting, group 8.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory

Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 20, 2010.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Section 180.474 is amended by revising the introductory text of paragraphs (a)(1), (a)(2), and (c) and alphabetically add the commodity "vegetable, fruiting, group 8" to the table in paragraph (a)(1) to read as follows:

§ 180.474 Tebuconazole; tolerances for residues.

(a) *General.* (1) Tolerances are established for residues of the fungicide tebuconazole, including its metabolites and degradates, in or on the commodities in the following table. Compliance with the tolerance levels specified in the following table is to be determined by measuring only tebuconazole (alpha-[2-(4-chlorophenyl)ethyl]-alpha-(1,1-dimethylethyl)-1*H*-1,2,4-triazole-1-ethanol), in or on the commodity.

Commodity	Parts per million
* *	* * *
Vegetable, fruiting, group 8	1.3
* *	* * *

(2) Tolerances are established for residues of the fungicide tebuconazole, including its metabolites and degradates, in or on the commodities in the following table. Compliance with the tolerance levels specified in the following table is to be determined by measuring only the sum of tebuconazole (alpha-[2-(4-chlorophenyl)ethyl]-alpha-(1,1-dimethylethyl)-1*H*-1,2,4-triazole-1-ethanol) and its diol metabolite (1-(4-chlorophenyl)-4,4-dimethyl-3-(1*H*-1,2,4-triazole-1-yl-methyl)-pentane-3,5-diol), calculated as the stoichiometric equivalent of tebuconzole, in or on the commodity.

* * * * *

(c) *Tolerances with Regional Registrations.* Tolerances are established for residues of the fungicide tebuconazole, including its metabolites and degradates, in or on the commodities in the following table. Compliance with the tolerance levels specified below is to be determined by measuring only tebuconazole, alpha-[2-(4-chlorophenyl)ethyl]-alpha-(1,1-dimethylethyl)-1*H*-1,2,4-triazole-1-ethanol, in or on the commodity.

* * * * *

[FR Doc. 2010–10406 Filed 5–4–10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2009–0139; FRL–8820–4]

Spirodiclofen; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of spirodiclofen per se (3-(2,4-dichlorophenyl)-2-oxo-1-oxaspiro[4,5]dec-3-en-4-yl 2,2-dimethylbutanoate) in or on multiple commodities which are identified and discussed later in this document. Bayer CropScience requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective May 5, 2010. Objections and requests for hearings must be received on or before July 6, 2010, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION.**

ADDRESSES: EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPP–2009–0139. All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The Docket Facility is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Rita Kumar, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200

Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 308–8291; e-mail address: *kumar.rita@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to those engaged in the following activities:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather to provide a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Electronic Access to Other Related Information?

You may access a frequently updated electronic version of EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR cite at *http://www.gpoaccess.gov/ecfr.*

C. Can I File an Objection or Hearing Request?

Under section 408(g) of FFDCA, 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2009–0139 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before July 6, 2010. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket that is described in **ADDRESSES**. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit this copy, identified by docket ID number EPA–HQ–OPP–2009–0139, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

II. Petition for Tolerance

In the **Federal Register** of June 10, 2009 (74 FR 27538) (FRL–8915–5), EPA issued a notice pursuant to section 408(d)(3) of FFDCA, 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 8F7500) by Bayer CropScience, P.O. Box 12014, 2 T.W. Alexander Dr., Research Triangle Park, N.C. 27709. The petition requested that 40 CFR 180.608 be amended by establishing tolerances for residues of the insecticide spirodiclofen,(3-(2,4-dichlorophenyl)-2-oxo-1-oxaspiro[4,5]dec-3-en-4-yl 2,2-dimethylbutanoate), in or on avocado, black sapote, canistel, mamey sapote, mango, papaya, sapodilla, and star apple at 1.3 parts per million (ppm). That notice referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available in the docket, *http://www.regulations.gov*. There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has revised the proposed tolerances to 1.0 ppm; and changed the tolerance expression to spirodiclofen per se (3-(2,4-dichlorophenyl)-2-oxo-1-oxaspiro[4,5]dec-3-en-4-yl 2,2-dimethylbutanoate). The reason for these changes are explained in Unit IV.D.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(b)(2)(A)(i) of FFDCA allows EPA to establish a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is "safe." Section 408(b)(2)(A)(ii) of FFDCA defines "safe" to mean that "there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information." This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to "ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue."

Consistent with section 408(b)(2)(D) of FFDCA, and the factors specified in section 408(b)(2)(D) of FFDCA, EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for spirodiclofen including exposure resulting from the tolerances established by this action. EPA's assessment of exposures and risks associated with spirodiclofen follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Spirodiclofen has a low acute toxicity via the oral, dermal, and inhalation routes. It is not an eye or dermal irritant. However, it is a potential skin sensitizer. Following oral administration, spirodiclofen is rapidly absorbed, metabolized, and excreted via urine and feces. A rat whole body autoradiography study showed no accumulation in any specific organs or tissues following oral administration. Evidence of developmental toxicity was not observed in the rabbit developmental toxicity study. The rat

developmental toxicity study resulted in an increased incidence of slight dilatation of the renal pelvis 1,000 milligrams/kilograms/day (mg/kg/day); highest dose tested (HDT) at a dose which did not cause maternal toxicity. In the 2-generation reproductive toxicity study, developmental effects were observed in F1 males (i.e., delayed sexual maturation, decreased testicular spermatid and epididymal sperm counts (oligospermia); and atrophy of the testes, epididymides, prostate, and seminal vesicles) and F1 females (i.e., increased severity of ovarian luteal cell vacuolation/degeneration) but at a higher dose (1,750 ppm) than the systemic effects seen for parents and offspring (350 ppm). Spirodiclofen did not show any evidence of neurotoxicity in the acute and subchronic neurotoxicity studies. In a developmental neurotoxicity study (DNT), a decrease in retention was observed in the memory phase of the water maze for postnatal day (PND) 60 females at all doses. In this DNT study, the morphometric measurements were not performed at the low- and mid-doses; therefore, the registrant conducted a new study using identical experimental conditions as the previous study. The results of the new study demonstrated no treatment related maternal or offspring toxicity at the HDT. Therefore, it can be concluded that spirodiclofen is unlikely to be a neurotoxic or developmentally neurotoxic compound.

Spirodiclofen has been shown to have adverse effects on several organs of the endocrine system at relatively low doses. Testicular effects were observed in dogs, rats, and mice, manifested as Leydig cell vacuolation in dogs, hypertrophy in dogs and mice, and hyperplasia progressing to adenomas in rats, following chronic exposure. In female rats, increased incidence of uterine nodules and uterine adenocarcinoma were observed at terminal sacrifice in the chronic toxicity study. Cytoplasmic vacuolation in the adrenal cortex, accompanied by increased adrenal weight, was consistently observed in rats, dogs, and mice of both sexes.

Chronic toxicity and carcinogenicity studies showed increased incidence of uterine adenocarcinoma in female rats, Leydig cell adenoma in male rats, and liver tumors in mice. EPA classified spirodiclofen as "likely to be carcinogenic to humans" by the oral route based on evidence of testes Leydig cell adenomas in male rats, uterine adenomas and/or adenocarcinoma in female rats, and liver tumors in mice. Mutagenicity studies conducted with the technical spirodiclofen formulation and its major metabolites did not demonstrate any mutagenic potential. EPA has determined that quantification of human cancer risk using a linear low-dose extrapolation approach is appropriate.

Specific information on the studies received and the nature of the adverse effects caused by spirodiclofen as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in document "Human Health Risk Assessment Associated with the Section 3 Registration Application for Avocado, Black Sapote, Canistel, Mamey Sapote, Mango, Papaya, Sapodilla, and Star Apple," p.10 in docket ID number EPA–HQ–OPP–2009–0139.

B. Toxicological Points of Departure/ Levels of Concern

Once a pesticide's toxicological profile is determined, EPA identifies toxicological points of departure (POD) and levels of concern to use in evaluating the risk posed by human exposure to the pesticide. For hazards that have a threshold below which there is no appreciable risk, the toxicological POD is used as the basis for derivation of reference values for risk assessment. PODs are developed based on a careful analysis of the doses in each toxicological study to determine the dose at which no adverse effects are observed (the NOAEL) and the lowest dose at which adverse effects of concern are identified (the LOAEL). Uncertainty/ safety factors are used in conjunction with the POD to calculate a safe exposure level – generally referred to as a population-adjusted dose (PAD) or a reference dose (RfD) – and a safe margin of exposure (MOE). For non-threshold risks, the Agency assumes that any amount of exposure will lead to some degree of risk. Thus, the Agency estimates risk in terms of the probability of an occurrence of the adverse effect expected in a lifetime. For more information on the general principles EPA uses in risk characterization and a complete description of the risk assessment process, see *http://www.epa.gov/pesticides/factsheets/riskassess.htm*.

A summary of the toxicological endpoints for spirodiclofen used for human risk assessment can be found at *http://www.regulations.gov* in document "Human Health Risk Assessment Associated with the Section 3 Registration Application for Avocado, Black Sapote, Canistel, Mamey Sapote, Mango, Papaya, Sapodilla, and Star Apple," p. 12 in docket ID number EPA–HQ–OPP–2009–0139.

C. Exposure Assessment

1. *Dietary exposure from food and feed uses*. In evaluating dietary exposure to spirodiclofen, EPA considered exposure under the petitioned-for tolerances as well as all existing spirodiclofen tolerances in 40 CFR 180.608. EPA assessed dietary exposures from spirodiclofen in food as follows:

i. *Acute exposure*. Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1–day or single exposure.

No such effects were identified in the toxicological studies for spirodiclofen; therefore, a quantitative acute dietary exposure assessment is unnecessary.

ii. *Chronic exposure*. In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 Continuing Survey of Food Intake (CSFII). As to residue levels in food, EPA assumed the following:

a. Average field trial residues;

b. Experimentally determined processing factors for apple and grape processed commodities and for citrus oil, peeled citrus, and citrus peel (DEEM (ver 7.81) defaults assumed for the remaining processed commodities); and

c. Maximum reasonably balanced livestock diets.

iii. *Cancer*. EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. Cancer risk is quantified using a linear or non-linear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or non-linear approach is used and a cancer RfD is calculated based on an earlier non-cancer key event. If carcinogenic mode of action data are not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. Based on the data summarized in Unit III.A., EPA has classified spirodiclofen as "Likely to be Carcinogenic to Humans" and used a linear approach to quantify cancer risk. Exposure for evaluating cancer risk was assessed using the same estimates as discussed in Unit III.C.1.ii.

iv. *Anticipated residue and percent crop treated (PCT) information*. Section 408(b)(2)(E) of FFDCA authorizes EPA to use available data and information on the anticipated residue levels of

pesticide residues in food and the actual levels of pesticide residues that have been measured in food. If EPA relies on such information, EPA must require pursuant to FFDCA section 408(f)(1) that data be provided 5 years after the tolerance is established, modified, or left in effect, demonstrating that the levels in food are not above the levels anticipated. For the present action, EPA will issue such data call-ins as are required by FFDCA section 408(b)(2)(E) and authorized under FFDCA section 408(f)(1). Data will be required to be submitted no later than 5 years from the date of issuance of these tolerances. Average field trial residues were assumed for chronic and cancer analysis.

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition A: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- Condition B: The exposure estimate does not underestimate exposure for any significant subpopulation group.
- Condition C: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

The Agency estimated the PCT for existing uses as follows: Hop (92%), pome fruit (15%), stone fruit (10%), grape (7%), and citrus (14%).

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

The Agency believes that the three conditions discussed in Unit III.C.1.iv. have been met. With respect to Condition A, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. The Agency is reasonably certain that the percentage of the food treated is not likely to be an underestimation. As to Conditions B and C, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which spirodiclofen may be applied in a particular area.

2. *Dietary exposure from drinking water*. The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for spirodiclofen in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of spirodiclofen. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm*.

Based on the PRZM/EXAMS and Screening Concentration in Ground Water (SCI-GROW) models, the estimated drinking water concentrations (EDWCs) of spirodiclofen for chronic exposures for non-cancer assessments are estimated to be 4.99 ppb for surface water and 0.44 ppb for ground water. The EDWCs of spirodiclofen for chronic exposures for cancer assessments are estimated to be 1.67 ppb for surface water and 0.44 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model.

For chronic dietary risk assessment, the water concentration of value 4.99 ppb was used to assess the contribution to drinking water.

For cancer dietary risk assessment, the water concentration of value 1.67 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure*. The term "residential exposure" is used in this document to refer to non-occupational, non-dietary exposure (e.g., for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets).

Spirodiclofen is not registered for any specific use patterns that would result in residential exposure.

4. *Cumulative effects from substances with a common mechanism of toxicity*. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider "available information" concerning the cumulative effects of a particular pesticide's residues and "other substances that have a common mechanism of toxicity."

EPA has not found spirodiclofen to share a common mechanism of toxicity with any other substances, and spirodiclofen does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that spirodiclofen does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *http://www.epa.gov/pesticides/cumulative*.

D. Safety Factor for Infants and Children

1. *In general*. Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

2. *Prenatal and postnatal sensitivity*. The spirodiclofen toxicity database is adequate to evaluate the potential increased susceptibility of infants and children. In 2004, the Agency determined that there is no evidence (qualitative or quantitative) of increased

susceptibility in the rabbit developmental toxicity study or in the rat reproduction toxicity study following *in utero* and/or pre-/post-natal exposure of spirodiclofen. However, evidence for quantitative susceptibility was observed in a rat developmental toxicity study where an increased incidence of slight dilatation of the renal pelvis was observed at a dose (1,000 mg/kg/day; the limit dose) which did not cause any maternal toxicity. Two rat developmental neurotoxicity (DNT) studies were submitted to EPA following the assessment in 2004. The first study demonstrated increased susceptibility in the offspring based on the observed decreased retention in the memory phase of the water maze for postnatal day 60 females at all doses (LOAEL 6.5 mg/kg/day) and changes in brain morphometric parameters at the HDT (135.9 mg/kg/day; caudate putamen, parietal cortex, hippocampal gyrus, and dentate gyrus); there was no maternal toxicity at doses up to and including 135.9 mg/kg/day HDT. EPA requested information concerning the brain morphometric parameters in the low and mid doses with the petitioner indicating that the brain tissues were not appropriately preserved and analysis was therefore not possible. As a result, a second rat DNT study was submitted which also indicated increased susceptibility in offspring based on decreased pre-weaning body weight and body weight gain in males and females and decreased post-weaning body weights in males (LOAEL = 119.2 mg/kg/day; NOAEL = 28.6 mg/kg/day). Neurotoxicity was not observed in offspring in the second DNT study, and there was no maternal toxicity observed at doses up to and including 119.2 mg/kg/day.

EPA determined that the degree of concern is low for the quantitative susceptibility seen in the developmental toxicity study in rats. The increased incidence of slight renal pelvic dilation was observed at the limit-dose only without statistical significance and dose response. Renal pelvic dilation was considered to be a developmental delay and not a severe effect for developmental toxicity. The low background incidences in this study may be idiosyncratic to the strain of rats tested (Wistar), since renal pelvis dilations are commonly seen at higher incidences in other strains (Sprague-Dawley or Fisher) of rats. In addition, doses selected for risk assessment of spirodiclofen are much lower than the dose that caused these developmental delays. The two DNT studies suggest increased susceptibility of offspring due to exposure to spirodiclofen. However, there is no concern for the increased susceptibility seen in the first DNT study because the results were not reproduced in the second DNT study conducted using the identical doses and experimental conditions. The concern for increased susceptibility in the second DNT study is low because there is a well established NOAEL, marginal toxicity (slight changes in body weights), and all developmental/functional parameters were comparable to controls. In addition, doses selected for risk assessment of spirodiclofen are much lower than the dose that caused these marginal changes in the body weights of offspring in the second DNT study. There was no evidence of increased susceptibility in the developmental toxicity study in rabbits or the 2-generation reproduction study in rats.

3. *Conclusion*. EPA has determined that reliable data show the safety of infants and children would be adequately protected if the FQPA SF were reduced to 1X. That decision is based on the following findings:

i. The toxicity database for spirodiclofen is complete except for an immunotoxicity study which is required as a part of new data requirements in the 40 CFR part 158. However, the Agency does not believe that conducting a functional immunotoxicity study will result in a lower POD than that currently used for overall risk assessment. The toxicology database for spirodiclofen does not show any evidence of treatment-related effects on the immune system. The overall weight of evidence suggests that this chemical does not target the immune system. Therefore, a database uncertainty factor (UFDB) is not needed to account for the lack of this study.

ii. Based on the results of acute, subchronic and developmental neurotoxicity studies in rats (see Units III.A. and III.D.2.), EPA has concluded that there is no indication that spirodiclofen is a neurotoxic chemical.

iii. There is no evidence (qualitative or quantitative) of increased susceptibility in the rabbit developmental toxicity study or in the rat reproduction toxicity study following *in utero* and/or pre-/post-natal exposure of spirodiclofen. However, evidence for quantitative susceptibility was observed in a rat developmental toxicity study and the second DNT study. See Unit III.D.2. for a detailed discussion of why EPA determined that the degree of concern is low for the quantitative susceptibility seen in this studies.

iv. There are no residual uncertainties identified in the exposure databases. The dietary food exposure assessments were performed using reliable PCT information and anticipated residue values calculated from residue field trial results. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to spirodiclofen in drinking water. Residential exposures are not expected. These assessments will not underestimate the exposure and risks posed by spirodiclofen.

E. Aggregate Risks and Determination of Safety

EPA determines whether acute and chronic dietary pesticide exposures are safe by comparing aggregate exposure estimates to the acute PAD (aPAD) and chronic PAD (cPAD). For linear cancer risks, EPA calculates the lifetime probability of acquiring cancer given the estimated aggregate exposure. Short-, intermediate-, and chronic-term risks are evaluated by comparing the estimated aggregate food, water, and residential exposure to the appropriate PODs to ensure that an adequate MOE exists.

1. *Acute risk*. An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No adverse effect resulting from a single oral exposure was identified and no acute dietary endpoint was selected. Therefore, spirodiclofen is not expected to pose an acute risk.

2. *Chronic risk*. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to spirodiclofen from food and water will utilize 3.3% of the cPAD for all infants < 1 year old the population group receiving the greatest exposure. There are no residential uses for spirodiclofen.

3. *Short-term and intermediate-term risk*. Short-term and intermediate-term aggregate exposure take into account short-term and intermediate-term residential exposure plus chronic exposure to food and water (considered to be a background exposure level).

Spirodiclofen is not registered for any uses that would result in residential exposure. Therefore the short-term/intermediate-term aggregate risk is the sum of the risk from exposure to spirodiclofen through food and water and will not be greater than the chronic aggregate risk.

4. *Aggregate cancer risk for U.S. population*. Using the exposure assumptions described in Unit III.C.1.iii. for cancer, EPA has concluded that exposure to spirodiclofen to cancer from

food and water will result in a life-time cancer risk of 3 x 10^{-6}. EPA generally considers cancer risks in the range of 10^{-6} or less to be negligible. The precision which can be assumed for cancer risk estimates is best described by rounding to the nearest integral order of magnitude on the log scale; for example, risks falling between 3 x 10^{-7} and 3 x 10^{-6} are expressed as risks in the range of 10^{-6}. Considering the precision with which cancer hazard can be estimated, the conservativeness of low-dose linear extrapolation, and the rounding procedure described above in this Unit, cancer risk should generally not be assumed to exceed the benchmark level of concern of the range of 10^{-6} until the calculated risk exceeds approximately 3 x 10^{-6}. This is particularly the case where some conservatism is maintained in the exposure assessment. For the reasons explained below in this Unit, EPA concludes that there are significant conservatisms in the spirodiclofen exposure assessment. First, residue values are based on average field trial levels and not monitoring data. Monitoring data tends to be significantly lower than field trial data and the spirodiclofen monitoring data confirms this (all less than the limit of detection (LOD); LOD = 0.001-0.05 ppm; 2.5-23x lower than the residue used in the cancer assessment). Second, based on a critical commodity analysis conducted in DEEM-FCID, the major contributors to the cancer risk were hops (40% of the total exposure), water (19% of the total exposure), and orange juice (16% of the total exposure) and conservative residue estimates were used for these three commodities as follows:

i. *Hops.* Dietary exposure from hops is the result of beer consumption. DEEM-FCID assumes that 100% of the residue in hops are transferred to beer during the brewing process (no residue remain in/on the spent hops). Since spirodiclofen has low water solubility, this is a conservative assumption;

ii. *Drinking water.* The water residue estimate assumed 87% of the basin is cropped with 100% of the crops treated. Spirodiclofen is proposed/registered for application to orchard crops (pome fruit, citrus fruit, stone fruit, tree nuts, grape, and tropical fruits) which are unlikely to occupy 87% of a water basin. In addition, it is unlikely that spirodiclofen will capture the entire market within a water basin.

iii. *Orange juice.* Pending the submission of a new orange processing study, default grapefruit (2.1x), lemon (2.0x), lime (2.0x), orange (1.8x), and tangerine (2.3x) juice processing factors were assumed. In all likelihood this exaggerates exposure estimates given that grape and apple processing studies with spirodiclofen resulted in a reduction in residues in juice.

5. *Determination of safety*. Based on these risk assessments, EPA concludes that there is a reasonable certainty that no harm will result to the general population, or to infants and children from aggregate exposure to spirodiclofen residues.

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology (a liquid chromatography (LC)/mass spectrometry (MS)/(MS) method) is available to enforce the tolerance expression.

The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; e-mail address: *residuemethods@epa.gov*.

B. International Residue Limits

There are no Codex, Canadian, or Mexican maximum residue limits (MRLs) in/on these crops.

C. Response to Comments

There were no comments received in response to the notice of filing of the pesticide petition 8F7500.

D. Revisions to Petitioned-For Tolerances

EPA has revised the proposed tolerance levels and tolerance expression of spirodiclofen in/on the following commodities: Avocado from 1.3 ppm to 1.0 ppm; black sapote from 1.3 ppm to 1.0 ppm; canistel from 1.3 ppm to 1.0 ppm; mamey sapote from 1.3 ppm to 1.0 ppm; mango from 1.3 ppm to 1.0 ppm; papaya from 1.3 ppm to 1.0 ppm; sapodilla from 1.3 ppm to 1.0 ppm; and star apple from 1.3 ppm to 1.0 ppm. Based on review of the residue chemistry data submitted in support of this petition, EPA concluded that 1.0 ppm tolerance for residues of spirodiclofen per se in/on these crops is appropriate.

V. Conclusion

Therefore, tolerances are established for residues of spirodiclofen per se, (3-(2,4-dichlorophenyl)-2-oxo-1-oxaspiro[4,5]dec-3-en-4-yl 2,2-dimethylbutanoate), in or on avocado, black sapote, canistel, mamey sapote, mango, papaya, sapodilla, and star apple at 1.0 ppm.

VI. Statutory and Executive Order Reviews

This final rule establishes tolerances under section 408(d) of FFDCA in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled *Regulatory Planning and Review* (58 FR 51735, October 4, 1993). Because this final rule has been exempted from review under Executive Order 12866, this final rule is not subject to Executive Order 13211, entitled *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use* (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled *Protection of Children from Environmental Health Risks and Safety Risks* (62 FR 19885, April 23, 1997). This final rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, nor does it require any special considerations under Executive Order 12898, entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under section 408(d) of FFDCA, such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of section 408(n)(4) of FFDCA. As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled *Federalism* (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled *Consultation and Coordination with Indian Tribal Governments* (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the

Unfunded Mandates Reform Act of 1995 (UMRA) (Public Law 104–4).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note).

VII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 20, 2010.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

■ Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.608, alphabetically add the following commodities to the table in paragraph (a)(1) to read as follows:

§ 180.608 Spirodiclofen; tolerances for residues.

(a) General. (1) * * *

Commodity	Parts per million
* * * * *	
Avocado	1.0
Black sapote	1.0
Canistel	1.0
* * * * *	
Mamey sapote	1.0
Mango	1.0
* * * * *	
Papaya	1.0
* * * * *	
Sapodilla	1.0
Star apple	1.0

* * * * *

[FR Doc. 2010–10129 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–S

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 300–3, 301–10, 301–51, 301–52, 301–70, 301–75, Appendix C to Chapter 301, 302–6, and 302–9

[FTR Amendment 2010–02; FTR Case 2010–302; Docket Number 2010–0010, sequence 1]

RIN 3090–AJ02

Federal Travel Regulation (FTR); Transportation in Conjunction With Official Travel and Relocation

AGENCY: Office of Governmentwide Policy, General Services Administration (GSA).

ACTION: Final rule.

SUMMARY: This final rule amends the Federal Travel Regulation (FTR), by adding new terms and definitions for "Official travel" and "Transit system"; clarifies reimbursement for transportation at an official station while en route to and/or from an authorized temporary duty (TDY) location; clarifies reimbursement for transportation expenses within the surrounding area of a TDY location and provisions for payment under the FTR; and clarifies when the Government contractor-issued travel charge card must be used while on official travel. Clarification of this rule is addressed in the supplementary information below.

DATES: *Effective date:* This final rule is effective June 4, 2010. *Applicability date:* This final rule is applicable to travel performed on and after June 4, 2010.

FOR FURTHER INFORMATION CONTACT: The Regulatory Secretariat (MVCB), Room 4041, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Rick Miller, Office of Governmentwide Policy, at (202) 501–3822 or e-mail at *rodney.miller@gsa.gov.* Please cite FTR Amendment 2010–02, FTR case 2010–302.

SUPPLEMENTARY INFORMATION:

A. Background

Title 5, United States Code § 5707 (5 U.S.C. 5707), authorizes the Administrator of General Services to prescribe necessary regulations to implement laws regarding Federal employees who are traveling while in the performance of official business away from their official stations. Similarly, 5 U.S.C. 5738 mandates that the Administrator of General Services prescribe regulations relating to official relocation. The overall implementing authority is the Federal Travel Regulation (FTR), codified in Title 41 Code of Federal Regulations, Chapters 300–304 (41 CFR chapters 300–304). Expenses incurred at an employee's official station not in conjunction with TDY and/or relocation do not fall under the authority of the FTR. Therefore, this final rule adds terms and definitions for "Official travel" and "Transit system" and also removes references to "local travel," "local transit system," "local transportation," "local transportation system," "local telephone calls," and "local metropolitan transportation fares," for reimbursement that is not in conjunction with TDY and/or relocation. Federal employees should adhere to their agency's policies for reimbursement of expenses incurred for transportation within the vicinity of their official stations when expenses do not pertain to TDY or relocation. This final rule clarifies that the Government contractor-issued travel charge card will only be used for the purposes of official travel-related expenses and not for personal use while on an official travel authorization.

B. Executive Order 12866

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This final rule is not a major rule under 5 U.S.C. 804.

C. Regulatory Flexibility Act

This final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.,* because the revisions are not considered substantive. This final rule is also exempt from the Regulatory Flexibility Act per 5 U.S.C. 553(a)(2) because it applies to agency management.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FTR do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

E. Small Business Regulatory Enforcement Fairness Act

This final rule is also exempt from congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Parts 300–3, 301–10, 301–51, 301–52, 301–70, 301–75, 302–6, and 302–9, and Appendix C to Chapter 301

Government employees, Travel and transportation expenses.

Dated: March 25, 2010.

Martha Johnson,

Administrator of General Services.

■ For the reasons set forth in the preamble, under 5 U.S.C. 5701–5709 and 5721–5738, 41 CFR subtitle F is amended as follows:

CHAPTER 300—GENERAL

PART 300–3—GLOSSARY OF TERMS

■ 1. The authority citation for 41 CFR part 300–3 is revised to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); 49 U.S.C. 40118; 5 U.S.C. 5738; 5 U.S.C. 5741–5742; 20 U.S.C. 905(a); 31 U.S.C. 1353; E.O. 11609, as amended; 3 CFR, 1971–1975 Comp., p. 586, OMB Circular No. A–126, revised May 22, 1992.

■ 2. Amend § 300–3.1 by adding in alphabetical order, the definitions "Official travel" and "Transit system" to read as follows:

§ 300–3.1 What do the following terms mean?

* * * * *

Official travel—Travel under an official travel authorization from an employee's official station or other authorized point of departure to a temporary duty location and return from a temporary duty location, between two temporary duty locations, or relocation at the direction of a Federal agency.

* * * * *

Transit system—A form of transportation (*e.g.,* air, rail, bus, ship, etc.) used between authorized locations in the performance of official travel.

* * * * *

CHAPTER 301—TEMPORARY DUTY (TDY) TRAVEL ALLOWANCES

PART 301–10—TRANSPORTATION EXPENSES

■ 3. The authority citation for 41 CFR part 301–10 is revised to read as follows:

Authority: 5 U.S.C. 5707, 40 U.S.C. 121(c); 49 U.S.C. 40118; OMB Circular No. A–126, revised May 22, 1992.

■ 4. Revise § 301–10.1 to read as follows:

§ 301–10.1 Am I eligible for payment of transportation expenses?

Yes, you are eligible for payment of transportation expenses when performing official travel, including authorized transportation expenses incurred within the TDY location.

§ 301–10.3 [Amended]

■ 5. Amend § 301–10.3 by removing from paragraph (a) the word "local" and adding the word "other" in its place.

§ 301–10.100 [Amended]

■ 6. Amend § 301–10.100 by removing the word "local" and adding the word "other" in its place.

■ 7. Revise the undesignated center heading that appears immediately before § 301–10.190 to read as follows:

Transit Systems

■ 8. Revise § 301–10.190 to read as follows:

§ 301–10.190 When may I use a transit system as a means of transportation in conjunction with official travel?

You may use a transit system as a means of transportation in conjunction with official travel when such transportation is authorized and approved by your agency in the following manner:

(a) *At your official station.* (1) From your residence or other authorized point of departure, *e.g.,* rail to airport;

(2) To your residence or other authorized point of return, *e.g.,* airport to rail;

(3) From your residence to your office on the day you depart the official station on official TDY that requires at least one night's lodging; or

(4) From your office to your residence on the day you return to the official station from an official TDY assignment that required at least one night's lodging.

(b) *At your TDY location.* (1) From the TDY transit system station(s) to your place of lodging or place of official business and return;

(2) To, from, and between your places of lodging and official business;

(3) Between places of official business; or

(4) To obtain meals at the nearest available place when the nature and location of the official business or the lodging at a TDY location are such that meals cannot be obtained there. You must attach a statement or include electronic remarks with your travel voucher explaining why such transportation was necessary.

■ 9. Revise § 301–10.420 to read as follows:

§ 301–10.420 When may I use a taxi, shuttle service or other courtesy transportation?

(a) When authorized and approved by your agency, your transportation expenses in the performance of official travel are reimbursable for the usual fare plus tip for use of a taxi, shuttle service or other courtesy transportation (if charges result), in the following manner:

(1) *At your official station.* (i) From your residence or other authorized point of departure, *e.g.,* residence to airport;

(ii) To your residence or other authorized point of return, *e.g.,* airport to residence;

(iii) From your residence to your office on the day you depart the official station on official TDY that requires at least one night's lodging; or

(iv) From your office to your residence on the day you return to the official station from an official TDY assignment that required at least one night's lodging.

(2) *At your TDY location.* (i) From the TDY transit system station to your place of lodging or place of official business and return;

(ii) To, from, and between your places of lodging and official business;

(iii) Between places of official business; or

(iv) To obtain meals at the nearest available place when the nature and location of the official business or the lodging at a TDY location are such that meals cannot be obtained there. You must attach a statement or include electronic remarks with your travel voucher explaining why such transportation was necessary.

(b) *Courtesy transportation.* You should use courtesy transportation service furnished by hotels/motels to the maximum extent possible as a first source of transportation between a place of lodging at the TDY station and a common carrier terminal. You will be reimbursed for tips when you use courtesy transportation service.

(c) *Restrictions.* When appropriate, your agency will restrict or place a monetary limit on the amount of reimbursement for the use of taxicabs under this paragraph when—

(1) Suitable Government or common carrier transportation service, including shuttle service, is available for all or part of the distance involved; or

(2) Courtesy transportation service is provided by hotels/motels between the place of lodging at the TDY station and the common carrier terminal.

PART 301–51—PAYING TRAVEL EXPENSES

■ 10. The authority citation for 41 CFR part 301–51 continues to read as follows:

Authority: 5 U.S.C. 5707. Subpart A is issued under the authority of Sec. 2, Pub. L. 105–264, 112 Stat. 2350 (5 U.S.C. 5701 note); 40 U.S.C. 121(c).

■ 11. Amend § 301–51.2 by revising paragraph (d) to read as follows:

§ 301–51.2 What official travel expenses and/or classes of employees are exempt from the mandatory use of the Government contractor-issued travel charge card?

* * * * *

(d) Transit system at a TDY location;

* * * * *

■ 12. Revise § 301–51.6 to read as follows:

§ 301–51.6 For what purposes may I use the Government contractor-issued travel charge card while on official travel?

You are required to use the Government contractor-issued travel charge card for expenses directly related to your official travel.

■ 13. Revise § 301–51.7 to read as follows:

§ 301–51.7 May I use the Government contractor-issued travel charge card for personal reasons while on official travel?

No, you may not use the Government contractor-issued travel charge card for personal reasons while on official travel.

■ 14. Add § 301–51.8 to read as follows:

§ 301–51.8 What are the consequences if I misuse the Government contractor-issued travel charge card on official travel?

Your agency may take appropriate disciplinary action if you misuse the Government contractor-issued travel charge card according to internal agency policies and procedures.

§ 301–51.200 [Amended]

■ 15. Amend § 301–51.200, paragraph (a) introductory text, in the second column of the table, by adding "are on official" before the word "travel" and in paragraph (a)(2), in the first column of the table, by removing "local transportation system" and adding "transit systems" in its place.

PART 301–52—CLAIMING REIMBURSEMENT

■ 16. The authority citation for 41 CFR Part 301–52 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); Sec. 2., Pub. L. 105–264, 112 Stat. 2350 (5 U.S.C. 5701 note).

■ 17. Amend § 301–52.2 by revising paragraph (a)(1) to read as follows:

§ 301–52.2 What information must I provide in my travel claim?

* * * * *

(a) * * *

(1) You may aggregate official travel-related expenses incurred at the TDY location for authorized telephone calls, transit system fares, and parking meter fees, except any individual expenses costing over $75 must be listed separately;

* * * * *

PART 301–70—INTERNAL POLICY AND PROCEDURE REQUIREMENTS

■ 18. The authority citation for 41 CFR Part 301–70 is revised to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 121(c); Sec. 2, Pub. L. 105–264, 112 Stat. 2350 (5 U.S.C. 5701, note), OMB Circular No. A–126, revised May 22, 1992, and OMB Circular No. A–123, Appendix B, revised January 15, 2009.

§ 301–70.102 [Amended]

■ 19. Amend § 301–70.102 by removing from paragraph (h) introductory text "For local transportation whether" and adding the word "Whether" in its place; and adding "in conjunction with TDY" before the word "or".

■ 20. Amend § 301–70.704 by revising paragraph (d) to read as follows:

§ 301–70.704 What expenses and/or classes of employees are exempt from the mandatory use of the Government contractor-issued travel charge card?

* * * * *

(d) Transit system at a TDY location;

* * * * *

■ 21. Revise § 301–70.706 to read as follows:

§ 301–70.706 For what purposes may an employee use the Government contractor-issued travel charge card while on official travel?

An employee is required to use the Government contractor-issued travel charge card for expenses directly related to official travel.

■ 22. Revise § 301–70.707 to read as follows:

§ 301–70.707 May an employee use the Government contractor-issued travel charge card for personal use while on official travel?

No, an employee may not use the Government contractor-issued travel charge card for personal use while on official travel.

§ 301–70.708 [Redesignated as § 301–70.709]

■ 23. Redesignate § 301–70.708 as section § 301–70.709.

■ 24. Add new § 301–70.708 to read as follows:

§ 301–70.708 What actions may we take if an employee misuses the Government contractor-issued travel charge card while on official travel?

You may take appropriate disciplinary action if an employee misuses the Government contractor-issued travel charge card. Internal agency policies and procedures should define what the agency considers to be misuses of the travel charge card.

PART 301–75—PRE–EMPLOYMENT INTERVIEW TRAVEL

■ 25. The authority citation for 41 CFR part 301–75 continues to read as follows:

Authority: 5 U.S.C. 5707.

§ 301–75.200 [Amended]

■ 26. Amend § 301–75.200, in the first column of the table, in the first entry, by removing "local transportation" and adding "transit systems at the agency's location" in its place.

Appendix C to Chapter 301 [Amended]

■ 27. Amend Appendix C to Chapter 301 by—

■ a. In the second table, under the heading "Commercial Transportation Information", in the first column under the heading "Group name", removing the fifth entry, "Local Transportation Indicator" and adding "Transportation in Performance of TDY or While at the TDY Location" in its place;

■ b. In the second table, under the heading "Commercial Transportation Information", in the third column under the heading "Description", removing the last entry, "Identifies local transportation used while on TDY" and adding "Identifies transportation used while in the performance of TDY or while at the TDY location" in its place; and

■ c. In the third table, under the heading "Travel Expense Information", in the first column under the heading "Group name", removing the fifth entry, "Local Transportation (in, around, or about the temporary duty station)" and adding "Transportation in Performance of TDY or While at the TDY Location" in its place.

CHAPTER 302—RELOCATION ALLOWANCES

PART 302–6—ALLOWANCE FOR TEMPORARY QUARTERS SUBSISTENCE EXPENSES

■ 28. The authority citation for 41 CFR part 302–6 is revised to read as follows:

Authority: 5 U.S.C. 5738; 20 U.S.C. 905(a); E.O. 11609, as amended, 3 CFR, 1971–1973 Comp., p. 586.

§ 302–6.2 [Amended]

■ 29. Amend § 302–6.2 by removing the word "local".

■ 30. Revise § 302–6.18 to read as follows:

§ 302–6.18 May I be reimbursed for transportation expenses incurred while I am occupying temporary quarters?

Transportation expenses incurred in the vicinity of the temporary quarters are not TQSE, and therefore, there is no authority to pay such expenses under TQSE.

PART 302–9—ALLOWANCES FOR TRANSPORTATION AND EMERGENCY STORAGE OF A PRIVATELY OWNED VEHICLE

■ 31. The authority citation for 41 CFR part 302–9 is revised to read as follows:

Authority: 5 U.S.C. 5738; 20 U.S.C. 905(a); E.O. 11609, as amended, 3 CFR, 1971–1973 Comp., p. 586.

§ 302–9.10 [Amended]

■ 32. Amend § 302–9.10, by removing the word "local" wherever it appears.

[FR Doc. 2010–10235 Filed 5–4–10; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 424 and 431

[CMS–6010–IFC]

RIN 0938–AQ01

Medicare and Medicaid Programs; Changes in Provider and Supplier Enrollment, Ordering and Referring, and Documentation Requirements; and Changes in Provider Agreements

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Interim final rule with comment period.

SUMMARY: This interim final rule with comment period implements several provisions set forth in the Patient Protection and Affordable Care Act (Affordable Care Act). It implements the provision which requires all providers of medical or other items or services and suppliers that qualify for a National Provider Identifier (NPI) to include their NPI on all applications to enroll in the Medicare and Medicaid programs and on all claims for payment submitted under the Medicare and Medicaid programs. This interim final rule with comment period also requires physicians and eligible professionals to order and refer covered items and services for Medicare beneficiaries to be enrolled in Medicare. In addition, it adds requirements for providers, physicians, and other suppliers participating in the Medicare program to provide documentation on referrals to programs at high risk of waste and abuse, to include durable medical equipment, prosthetics, orthotics and supplies (DMEPOS), home health services, and other items or services specified by the Secretary.

DATES: *Effective date:* These regulations are effective on July 6, 2010. *Comment date:* To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on July 6, 2010.

ADDRESSES: In commenting, please refer to file code CMS–6010–IFC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed).

- *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions for submitting comments on the home page.
- *By regular mail.* You may mail written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–6010–IFC, P.O. Box 8013, Baltimore, MD 21244–8013.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

- *By express or overnight mail.* You may send written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–6010–IFC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.
- *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–7195 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by following the instructions at the end of the "Collection of Information Requirements" section in this document.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Patricia Peyton, (410) 786–1812 for Medicare issues. Rick Friedman, (410) 786–4451 for Medicaid issues.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will be also available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday

through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

The Medicare program, title XVIII of the Social Security Act (the Act), is the primary payer of health care for 42 million enrolled beneficiaries. Under section 1802 of the Act, a beneficiary may obtain health services from an individual or an organization qualified to participate in the Medicare program. Qualifications to participate are specified in statute and in regulations (see, for example, sections 1814, 1815, 1819, 1833, 1834, 1842, 1861, 1866, and 1891 of the Act); and 42 CFR chapter IV, subchapter E, which concerns standards and certification requirements).

Providers and suppliers furnishing services must comply with the Medicare requirements stipulated in the Act and in our regulations. These requirements are meant to ensure compliance with applicable statutes, as well as to promote the furnishing of high quality care. As Medicare program expenditures have grown, we have increased our efforts to ensure that only qualified individuals and organizations are allowed to enroll or maintain their Medicare billing privileges.

Medicaid is a joint Federal and State health care program for eligible low-income individuals. States have considerable flexibility in how they administer their Medicaid programs within a broad Federal framework and programs vary from State to State.

The Patient Protection and Affordable Care Act (the Affordable Care Act) (Pub. L. 111–148) makes a number of changes to the Medicaid program, strengthening tools for quality and integrity, adding new benefits, and expanding coverage. To maintain program integrity and assure quality, it is consistent with these changes to assure that only qualified providers participate in the program and that these providers bill accurately for their services. Although our regulations provide States with considerable flexibility, the Federal framework includes some key requirements to ensure program integrity and quality care. For example, Medicaid providers must generally meet all State licensing and scope-of-practice requirements, and may be subject to additional Federal and State quality standards. Additionally, our regulations require timely filing of claims by providers.

Including the NPI on claims and enrollment applications is an important step in controlling fraud and abuse, ensuring a unique identifier so that States can assure that only qualified Medicaid providers have provider agreements and maintain their Medicaid billing privileges. This practice implements the requirement in section 1128J(e) of the Act, as added by section 6402(a) of the Affordable Care Act and will also help in implementing other important protections under the Affordable Care Act that ensure quality health care services for program beneficiaries.

A. Statutory Authority

The following is an overview of the sections that grant this authority.

- Sections 1102 and 1871 of the Act provide general authority for the Secretary of Health and Human Services (the Secretary) to prescribe regulations for the efficient administration of the Medicare program.
- Section 1128J(e) of the Act, added by section 6402(a) of the Affordable Care Act, requires that the Secretary require by regulation that all providers of medical or other items or services and suppliers under titles XVIII and XIX that are eligible for a national provider identifier (NPI) include the NPI on all applications to enroll in such programs and on all claims for payment under such programs.
- Sections 1814(a), 1815(a), and 1833(e) of the Act require the submission of information necessary to determine the amounts due a provider or other person.
- Section 1834(j)(1)(A) of the Act states that no payment may be made for items furnished by a supplier of medical equipment and supplies unless such supplier obtains (and renews at such intervals as the Secretary may require) a supplier number. In order to obtain a supplier number, a supplier must comply with certain supplier standards as identified by the Secretary.
- Section 1842(r) of the Act requires the Centers for Medicare and Medicaid Services (CMS) to establish a system for furnishing a unique identifier for each physician who furnishes services for which payment may be made.
- Section 1862(e)(1) of the Act states that no payment may be made when an item or service was at the medical direction of an individual or entity that is excluded in accordance with sections 1128, 1128A, 1156, or 1842(j)(2) of the Act.
- Section 4313 of the Balanced Budget Act of 1997 (BBA) (Pub. L. 105–33) amended sections 1124(a)(1) and 1124A of the Act to require disclosure of both the Employer Identification Number (EIN) and Social Security Number (SSN) of each provider or supplier, each person with ownership or control interest in the provider or supplier, any subcontractor in which the provider or supplier directly or indirectly has a 5 percent or more ownership interest, and any managing employees including Directors and Board Members of corporations and non-profit organizations and charities. The "Report to Congress on Steps Taken to Assure Confidentiality of Social Security Account Numbers as Required by the Balanced Budget Act" was signed by the Secretary and sent to the Congress on January 26, 1999. This report outlines the provisions of a mandatory collection of SSNs and EINs effective on or after April 26, 1999.
- Section 4312(a) of the Balanced Budget Act of 1997 amended section 1834(a)(16) of the Act by requiring certain Medicare suppliers of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) to furnish CMS with a surety bond. Section 4312(b) requires that a surety bond be in an amount of not less than $50,000.
- Section 31001(i)(1) of the Debt Collection Improvement Act of 1996 (DCIA) (Pub. L. 104–134) amended section 7701 of 31 U.S.C. by adding paragraph (c) to require that any person or entity doing business with the Federal Government must provide their Taxpayer Identification Number (TIN).
- Section 936(j)(1)(A) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) (Pub. L. 108–173) amended the Act to require the Secretary to establish a process for the enrollment of providers of services and suppliers.

We are authorized to collect information on the Medicare enrollment application (that is, the CMS–855, (Office of Management and Budget (OMB) approval number 0938–0685)) to ensure that correct payments are made to providers and suppliers under the Medicare program as established by title XVIII of the Act.

- Section 1902(a)(27) of the Act provides general authority for the Secretary to require provider agreements under the Medicaid State Plans with every person or institution providing services under the State Plan. Under these agreements, the Secretary may require information regarding any payments claimed by such person or institution for providing services under the State plan.

B. Historical Enrollment Initiatives

Historically, Medicare has permitted the enrollment of providers and suppliers whose qualifications for meeting all of our enrollment standards were sometimes questionable. This has raised concern that providers and

suppliers in our program may be underqualified or even fraudulent and has led us to increase our efforts to establish more stringent controls on provider and supplier entry into the Medicare program. The following is a summary of the regulations that we have published over the past 10 years to ensure that only qualified providers and suppliers are participating in the Medicare program.

In the October 11, 2000 **Federal Register**, we published the Additional Supplier Standards final rule with comment period where we established additional standards with which a DMEPOS supplier must comply in order to receive and maintain Medicare billing privileges. This final rule with comment period outlined the supplier requirements to ensure that suppliers of DMEPOS are qualified to furnish DMEPOS and to help safeguard the Medicare program and its beneficiaries from fraudulent or abusive billing practices.

In the April 21, 2006, **Federal Register**, we published the Requirements for Providers and Suppliers to Establish and Maintain Medicare Enrollment final rule that implemented section 1866(j)(1)(A) of the Act. In this final rule, we required that all providers and suppliers (other than those who have elected to "opt-out" of the Medicare program) complete an enrollment application and submit specific information to CMS in order to obtain Medicare billing privileges. This final rule also required that all providers and suppliers must periodically update and certify the accuracy of their enrollment information to receive and maintain billing privileges in the Medicare program. These regulatory provisions include requirements to protect beneficiaries and the Medicare Trust Fund by preventing unqualified, fraudulent, or excluded providers and suppliers from providing items or services to Medicare beneficiaries or from billing the Medicare program or its beneficiaries.

In the December 1, 2006, **Federal Register** (71 FR 69624), we published a final rule titled, "Medicare Program; Revisions to Payment Policies, Five-Year Review of Work Relative Value Units, Changes to the Practice Expense Methodology Under the Physician Fee Schedule, and Other Changes to Payment Under Part B; Revisions to the Payment Policies of Ambulance Services Under the Fee Schedule for Ambulance Services; and Ambulance Inflation Factor Update for CY 2007." In part, this final rule with comment established performance standards for independent diagnostic testing facilities.

In the April 10, 2007, **Federal Register** (72 FR 17992), we published a final rule titled, "Competitive Acquisition for Certain Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)." This final rule implemented section 302 of the MMA requiring that DMEPOS suppliers meet certain quality standards and established DME competitive bidding.

In the November 27, 2007 **Federal Register** (72 FR 66222), we published a final rule titled, "Medicare Program; Revisions to Payment Policies Under the Physician Fee Schedule, and Other Part B Payment Policies for CY 2008; Revisions to the Payment Policies of Ambulance Services Under the Ambulance Fee Schedule for CY 2008; and the Amendment of the E–Prescribing Exemption for Computer Generated Facsimile Transmissions; Final Rule." In this final rule, we clarified our interpretation of several of the existing independent diagnostic testing facility (IDTF) performance standards found at § 410.33(b) and § 410.33(g), proposed a new IDTF performance standard at § 410.33(g)(15), and a new proposed IDTF provision at § 410.33(i).

In the June 27, 2008, **Federal Register** (73 FR 36448), we published a final rule titled, "Appeals of CMS or CMS Contractor Determinations When a Provider or Supplier Fails to Meet the Requirements for Medicare Billing Privileges." This final rule implemented section 936 of the MMA and extended appeal rights to all providers and suppliers, including DMEPOS suppliers, whose enrollment applications for Medicare billing privileges are denied or revoked by CMS or a Medicare contractor (that is, carrier, fiscal intermediary, National Supplier Clearinghouse Medicare Administrative Contractor (MAC), or Part A/Part B MAC). This final rule also allowed providers and suppliers to seek judicial review after they have exhausted the administrative appeals process. In addition, this final rule also implemented provider enrollment provisions that apply to all provider and supplier types.

In the November 19, 2008, **Federal Register** (73 FR 69726), we published a final rule with comment titled, "Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2009; E–Prescribing Exemption for Computer Generated Facsimile Transmissions; and Payment for Certain Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)." In part, this final rule with comment period established a number of provider enrollment provisions affecting physicians, non-physician practitioners, and other providers and suppliers, such as the re-enrollment bar of 1 to 3 years on revoked providers and suppliers, as well as the limitation on retroactive billing by providers and suppliers.

In the January 2, 2009, **Federal Register** (74 FR 166), we published a final rule titled, "Medicare Program; Surety Bond Requirement for Suppliers of Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS); Final Rule." Consistent with section 4312(a) of the BBA, this final rule implemented section 1834(a)(16) of the Act by requiring certain Medicare suppliers of DMEPOS to furnish CMS with a surety bond of no less than $50,000.

Historically, the States in operating the Medicaid program have permitted the enrollment of providers and suppliers who meet the State requirements for Medicaid enrollment. Due to the increased risk of fraud and abuse in public health care programs of all types, the NPI requirement will strengthen cross-program integrity efforts.

II. Provisions of the Interim Final Rule With Comment Period

A. Inclusion of the National Provider Identifier (NPI) on all Medicare and Medicaid Enrollment Applications and Claims

1. Background

Section 1128J(e) of the Act builds on the past Congressional mandate to require the adoption of a unique identifier for health care providers and codifies the NPI requirements that Medicare is already requiring for its fee-for-service (FFS) providers and suppliers.

"Health care provider" is defined in the Health Insurance Portability and Accountability Act (HIPAA) definitions found at 45 CFR 160.103. With the exception of organ procurement organizations and Part B CAP drug vendors, the term "health care provider" includes all of the providers and suppliers who are eligible to enroll in the Medicare program and most who are eligible to enroll in the Medicaid program. In this discussion, we use the term "health care provider" when referring to HIPAA and HIPAA regulations, and we use "providers and suppliers" when referring to those health care providers who are eligible to enroll in the Medicare program.

In the January 23, 2004, NPI final rule (69 FR 3434), we adopted the NPI as the standard unique health identifier for health care providers. This fulfilled the

requirement of section 1173(b) of the Act, which was added by HIPAA. The final rule stated that HIPAA does not prohibit health plans from requiring their enrolled health care providers to obtain NPIs. Accordingly, the Medicare program required enrolling fee-for-service (FFS) providers and suppliers (and their subparts, in accordance with the NPI Final Rule) to report their NPIs on their Medicare enrollment applications beginning in May 2006. When FFS providers and suppliers who had enrolled prior to May 2006 submitted enrollment applications to update their enrollment information, they were required to report their NPIs on those enrollment applications. These requirements ensured that the Medicare provider and supplier enrollment records included the NPIs and, in effect, already implemented one of the provisions of section 1128J(e) of the Act.

In accordance with the NPI final rule and the subsequent guidance from the Secretary, beginning May 23, 2008, Medicare required its enrolled FFS providers and suppliers to use NPIs in their electronic claims to identify not only themselves as the billing providers, but any other providers or suppliers who, according to the Implementation Guides for the adopted standard claims transactions, were also required to be identified in those claims. These other health care providers include rendering providers, supervising providers, and ordering and referring providers. The regulations that adopted the HIPAA standard transactions are found at (65 FR 50312, 68 FR 8381, and 74 FR 3296). In addition, at that same time, Medicare required its enrolled FFS providers and suppliers to make this same use of NPIs in their paper claims.

The Provider Enrollment, Chain, and Ownership System (PECOS), implemented in 2003, is the national repository of enrolled Medicare FFS providers and suppliers (except DMEPOS suppliers, who will be added to PECOS later in 2010). PECOS contains the information furnished by providers and suppliers in their Medicare FFS enrollment applications and additional information added as required to keep the information current and to protect the integrity of the Medicare program (for example, fact and date of death, Office of Inspector General exclusions). In 2007, PECOS began sending the NPIs in the daily provider and supplier enrollment data extract going to the Part A and Part B FFS claims systems. In 2009, Medicare added the NPIs to the enrollment records of the DMEPOS suppliers, which are currently housed in the DMEPOS supplier enrollment repository at the National Supplier Clearinghouse MAC. After the DMEPOS supplier enrollment records are added to PECOS, PECOS will send a daily DMEPOS supplier enrollment data extract, which will include the NPIs, to the DMEPOS FFS claims system. Medicare FFS claims systems link the NPIs that are reported in claims with the appropriate enrollment records in order to properly price and pay the claims.

In summary, Medicare has been requiring its providers and suppliers to report their NPIs on their Medicare enrollment applications; its enrolled providers and suppliers to report their NPIs, and the NPIs of other providers and suppliers (as required and as explained previously) in their electronic and paper Medicare claims; and suppliers who order or refer covered items or services for Medicare beneficiaries to have NPIs so that they can be identified, as required, in the claims for the covered items and services that they have ordered and referred. Similarly, consistent with NPI final rule and subsequent guidance from the Secretary, beginning May 23, 2008, Medicaid providers have also been required to report their NPIs on their Medicaid claims. This IFC now requires their NPIs be submitted for Medicaid provider agreements.

2. Provisions of the Affordable Care Act

Section 6402(a) of the Affordable Care Act added a new section 1128J of the Act, entitled "Medicare and Medicaid Program Integrity Provisions." Section 1128J(e), as added by section 6402(a) of the Affordable Care Act, requires the Secretary to promulgate a regulation that requires, not later than January 1, 2011, all providers of medical or other items or services and suppliers under the programs under titles XVIII and XIX that qualify for a NPI to include their NPI on all applications to enroll in such programs and on all claims for payment submitted under such programs. In Medicaid, there is no Federally required process for provider enrollment except that all Medicaid providers are required to enter into a provider agreement with the State as a condition of participating in the program under section 1902(a)(27) of the Act. Therefore, in the Medicaid context we are including the submission of an NPI to the State agency as a requirement under the provider agreement. The NPI requirements in this IFC are thus applicable to the reporting of NPIs—(1) Pursuant to Medicaid provider agreements; (2) on Medicare provider and supplier enrollment applications; and (3) on Medicare and Medicaid claims.

3. Requirements Established by This IFC

For the Medicare program, we are establishing, at § 424.506(b), requirements that a provider or supplier who is eligible for an NPI must report the NPI on the Medicare enrollment application; and, if the provider or supplier enrolled in Medicare prior to obtaining an NPI and the NPI is not in the provider's or supplier's enrollment record, the provider or supplier must report the NPI to Medicare in an enrollment application so that the NPI will be added to the provider's or supplier's enrollment record in PECOS. We are also establishing, at § 424.506(b)(1), a requirement that a provider or supplier who is enrolled in fee-for-service (FFS) Medicare report its NPI, as well as the NPI of any other provider or supplier who is required to be identified in those claims, on any electronic or paper claims that the provider or supplier submits to Medicare. We are also establishing, at § 424.506(b)(2), that a claim submitted by a Medicare beneficiary contain the legal name and, if the beneficiary knows the NPI, the NPI of any provider or supplier who is required to be identified in that claim.

If a Medicare beneficiary does not know the NPI of a provider or supplier who is required to be identified in the claim that he or she is submitting, the beneficiary may submit the claim without the NPI(s) as long as the claim contains the legal name(s) of the health care provider(s). If a beneficiary so desires, he or she can obtain a provider's or a supplier's NPI by requesting it directly from the provider or supplier or from a member of his or her office staff, or by looking it up in the NPI Registry at *https://nppes.cms.hhs.gov/NPPES/NPIRegistryHome.do.*

Furthermore, we are establishing, at § 424.506(c)(3), that a Medicare claim from a provider or a supplier will be rejected if it does not contain the required NPI(s).

For the Medicaid program, we are establishing, at § 431.107(b)(5), a requirement that the agreement between a State agency and each provider furnishing services under the State plan include a requirement that any Medicaid provider eligible for an NPI furnish its NPI to the State agency under that agreement and on all Medicaid claims.

B. Ordering and Referring Covered Items and Services for Medicare Beneficiaries

1. Background

Section 1833(q) of the Act requires that claims for items or services for

which payment may be made under Part B and for which there was a referral by a referring physician shall include the name and the unique identification number of the referring physician. Physicians are doctors of medicine and osteopathy, optometry, podiatry, dental medicine, dental surgery, and chiropractic. Referring physicians are those who order covered items or services for Medicare beneficiaries from Medicare providers and suppliers as well as those who refer Medicare beneficiaries to Medicare providers and suppliers for covered services. We consider those who "refer" to also be authorized to "order." In this IFC, we refer to physicians who both order and refer as "ordering and referring suppliers" and the act of ordering items or services for Medicare beneficiaries or referring Medicare beneficiaries to other providers or suppliers for services as "ordering and referring."

The Implementation Guides for the adopted HIPAA standard transactions do not use the word "supplier" in their descriptions of the health care providers who must be identified in those transactions. For example, and as stated earlier in this preamble, the Implementation Guides use the terms "billing provider, ordering provider, referring provider" and others. Because this section of this IFC relates only to the Medicare program, and because the statute and regulations use the term "supplier" (not "provider") when referring to physicians and non-physician practitioners, we are using the term "ordering and referring suppliers" in this IFC. This term corresponds to "ordering provider" and "referring provider" described in the Implementation Guides.

The Medicare providers and suppliers who furnish the covered ordered or referred items and services send claims to Medicare for reimbursement for those covered items and services.

With the establishment and implementation of surrogate Unique Physician Identification Numbers (UPINs) in 1992, suppliers could be identified, but not uniquely identified, in claims as ordering and referring suppliers. These suppliers included physicians, physician assistants, clinical nurse specialists, nurse practitioners, clinical psychologists, certified nurse midwives, and clinical social workers.

Sections 6405(a) and (c) of the Affordable Care Act indicate that orders and referrals for DMEPOS and for other categories of items and services may be made by a physician or an "eligible professional under section 1848(k)(3)(B)." Section 1848(k)(3)(B) of the Act discusses covered professional services for which payment may be made under, or is based on, the fee schedule, and which are furnished by: (1) A physician; (2) a practitioner described in section 1842(b)(18)(C) of Act; (3) a physical or occupational therapist or a qualified speech-language pathologist; and (4) a qualified audiologist. Section 1842(b)(18)(C) of the Act discusses billing and payment for Medicare services furnished by physician assistants, nurse practitioners, clinical nurse specialists, certified registered nurse anesthetists, certified nurse-midwives, clinical social workers, clinical psychologists, and registered dietitians or nutrition professionals. Neither section 1848(k)(3)(B) of the Act nor section 1842(b)(18)(C) of the Act discuss the issue of ordering or referring covered items or services for Medicare beneficiaries. Although section 6405(a) of the Affordable Care Act indicates that DMEPOS may be ordered by enrolled physicians or enrolled eligible professionals under section 1848(k)(3)(B) of the Act, our policy has not been to permit all of the eligible professionals listed in that section or in section 1842(b)(18)(C) of the Act to order and refer. Section 6405(c) of the Affordable Care Act gives the Secretary the discretion to determine the professions that can order and refer for all covered items and services under title XVIII that are not mentioned in sections 6405(a) and (b) of the Affordable Care Act (DMEPOS and home health, respectively). In addition, the claims processing edits that we established in 2009 require that the ordering and referring suppliers for DMEPOS and for laboratory, imaging, and specialist services be those physicians and professionals who were eligible for UPINs: Physicians, physician assistants, clinical nurse specialists, nurse practitioners, clinical psychologists, certified nurse midwives, and clinical social workers. In this IFC, the term eligible professional means any of the professionals listed in section 1848(k)(3)(B) of the Act. In this preamble, we distinguish physicians from eligible professionals (even though physicians are included in section 1848(k)(3)(B) as eligible professionals) because sections 6405(a) and (b) of the Affordable Care Act reference physicians separately from eligible professionals. Section 6405(c) of the Affordable Care Act gives the Secretary the discretion to determine the health professions that can order and refer items and services other than DMEPOS and home health.

In the past, prior to the Medicare implementation of the NPI on May 23, 2008, physicians and eligible professionals were identified in claims as ordering or referring suppliers by their UPINs. Physicians and eligible professionals applied for and were assigned UPINs as part of the process of enrolling in the Medicare program; therefore, physicians and eligible professionals were expected to be identified in claims as ordering or referring suppliers by their UPINs.

Surrogate UPINs were established to be used in claims to temporarily identify certain ordering and referring suppliers who had not yet completed the Medicare enrollment process and, therefore, had not yet been assigned UPINs. Surrogate UPINs were used to collectively identify the following: (1) Physicians who were serving in the military or with the Department of Veterans Affairs or the Public Health Service (including the Indian Health Service); (2) interns, residents, and fellows; and (3) retired physicians. There was also a surrogate UPIN (OTH000) that could be used for any other supplier who ordered or referred who could not be identified by any of the other surrogate UPINs.

Over time, providers and suppliers began using surrogate UPINs in their claims to identify ordering and referring suppliers who had been assigned their own UPINs, as well as individuals who had never been assigned UPINs. In addition, they also used UPINs that had been assigned to physicians other than the physicians who they were identifying in their claims as the ordering or referring suppliers. We believe that many providers and suppliers became aware that the use of any UPIN would get their claims processed and paid. They learned, over time, that Medicare claims edits on the ordering and referring suppliers were based on the format of the UPIN, and all UPINs had the same format. The claims process did not verify the UPINs of ordering or referring suppliers. These practices negated the intent of the UPIN, which was to uniquely identify the ordering or referring supplier.

Analysis of Medicare claims data prior to 2008 (UPINs were not permitted to be used in Medicare claims after May 23, 2008) revealed that these practices were widespread and, as a result, we had reason to believe that many physicians and eligible professionals were unaware of the requirement that their assigned UPINs were intended to uniquely identify them as ordering or referring suppliers and, more importantly, that they needed to apply for UPINs. As a result, Medicare may have paid claims for covered ordered and referred items and services that may

have been ordered or referred by professionals who were not of a profession eligible to order and refer; by physicians or eligible professionals who were not enrolled in the Medicare program; or by physicians or eligible professionals who were not in an approved Medicare enrollment status (for example, they were sanctioned, their licenses were suspended or revoked, their billing privileges were terminated, or they were deceased).

With the Medicare implementation of the NPI in May 2008, Medicare discontinued the assignment of UPINs and no longer allowed UPINs to be used in Medicare claims. Medicare required providers and suppliers who were sending claims to Medicare for covered ordered and referred items and services to use the NPI, rather than the UPIN, to identify the ordering and referring suppliers in their claims. Because the NPI Final Rule did not discuss the concept of "surrogate NPIs" nor did it contain a provision for the establishment of "surrogate NPIs," surrogate NPIs do not and cannot exist. Because physicians and non-physician practitioners are eligible for NPIs, only the NPI may be used in Medicare claims to identify ordering and referring suppliers.

We believe that the new requirements discussed below will address concerns expressed by the Department of Health and Human Services' (DHHS) Office of Inspector General (OIG) report titled, "Durable Medical Equipment Ordered with Surrogate Physician Identification Numbers, OEI–03–01–00270, September 2002," which found that the use of surrogate UPINs on Medicare claims poses a vulnerability to the Medicare program. The HHS OIG found a substantial number of documentation problems in the supporting evidence submitted by suppliers for claims processed with surrogate UPINs. The DHHS OIG estimated that, in 1999, Medicare paid $61 million for services ordered with a surrogate UPIN that had missing or incomplete supporting documentation. Finally, the DHHS OIG stated that the findings in its report also revealed misuse of surrogate UPINs on Medicare claims. The HHS OIG found that surrogate UPINs were incorrectly used for many services since the ordering physician had already been issued a permanent UPIN. The HHS OIG believed this to be a significant problem given that the use of a surrogate UPIN on medical equipment claims allows them to be processed automatically whether the equipment has been ordered by a physician or not. The HHS OIG stated that the inappropriate use of surrogate UPINs by suppliers goes unchecked, the Medicare program becomes vulnerable to fraudulent billings and inappropriate payments.

To ensure the unique identification of ordering and referring suppliers and that they were qualified to order and refer, Medicare implemented claims edits in 2009 that require the ordering and referring suppliers identified in Part B claims for items of DMEPOS and services of laboratories, imaging suppliers, and specialists be identified by their legal names and their NPIs and that they have enrollment records in PECOS. Claims edits are under development to ensure that claims for Part A and Part B home health services identify the physicians who ordered the home health services by their legal names and their NPIs and that those physicians have enrollment records in PECOS.

2. Provisions of the Affordable Care Act

Section 6405(a) amended section 1834(a)(11)(B) of the Act to specify, with respect to suppliers of durable medical equipment, that payment may be made under that subsection only if the written order for the item has been communicated to the DMEPOS supplier by a physician who is enrolled under section 1866(j) of the Act or an eligible professional under section 1848(k)(3)(B) who is enrolled under section 1866(j) before delivery of the item. Section 1128J(e) requires that he or she be identified by his or her NPI in claims for those services. Medicare requires the ordering supplier (the physician or the eligible professional) to be identified by legal name and NPI in the claim submitted by the supplier of DMEPOS.

Section 10604 of the Affordable Care Act, amended section 6405(b) of the Affordable Care Act as follows: (1) Section 1814(a)(2) of the Act to specify, with respect to home health services under Part A, that payment may be made to providers of services if they are eligible and only if a physician enrolled under section 1866(j) of the Act certifies (and recertifies, as required) that the services are or were required in accordance with section 1814(a)(1)(C) of the Act; and (2) section 1835(a)(2) of the Act to specify, with respect to home health services under Part B, that payments may be made to providers of services if they are eligible and only if a physician enrolled under section 1866(j) of the Act certifies (and recertifies, as required) that the services are or were medically required in accordance with section 1835(a)(1)(B) of the Act. Section 1128J(e) requires that the physician be identified by his or her NPI in claims for those services. Medicare requires the ordering supplier (the physician) to be identified by legal name and NPI in the claim submitted by the provider of home health services.

In addition, section 6405(c) of the Affordable Care Act gives the Secretary the authority to extend the requirements made by subsections (a) and (b) to all other categories of items or services under title XVIII of the Social Security Act, including covered Part D drugs as defined in section 1860D–2(e) of the Act, that are ordered, prescribed, or referred by a physician enrolled under section 1866(j) of the Act or an eligible professional under section 1848(k)(3)(B) of the Act. Section 1128J(e) requires that he or she be identified by his or her NPI in claims for those services. Medicare requires the ordering or referring supplier (the physician or the eligible professional) to be identified by legal name and NPI in the claims submitted by the suppliers of laboratory, imaging, and specialist services. These amendments are effective on or after July 1, 2010.

3. Requirements of This IFC

To ensure that ordering suppliers (physicians and eligible professionals) are uniquely identified in Medicare claims for covered items of DMEPOS as required by section 6405(a) of the Affordable Care Act, and to ensure that those DMEPOS items are ordered by qualified physicians or eligible professionals, we are requiring at a new § 424.507(a), the following:

- In Part B claims for covered items of DMEPOS that require the identification of the ordering supplier, and with the exception noted below, the ordering supplier be a physician or an eligible professional with an approved enrollment record in PECOS (see the exception below), and be identified in the claim by his or her legal name and by his or her own NPI (that is, by the NPI that was assigned to him or her by the National Plan and Provider Enumeration System [NPPES] as an Entity type 1 [an individual]).

To ensure that ordering suppliers are uniquely identified in Medicare Part A claims for covered Part A or Part B home health services as required by section 6405(b), as amended by section 10604 of the Affordable Care Act, and to ensure that those home health services are ordered by qualified physicians, we are requiring at a new § 424.507, the following:

- In Part A claims for covered Part A and Part B home health items or services that require the identification of the ordering supplier, and with the exception noted below, the ordering supplier be a physician with an approved enrollment record in PECOS

(see the exception below), and be identified in the claim by his or her legal name and by his or her own NPI (that is, by the NPI that was assigned to him or her by the National Plan and Provider Enumeration System [NPPES] as an Entity type 1 [an individual]).

To ensure that ordering or referring suppliers are uniquely identified in Part B claims for covered services of laboratories, imaging suppliers, and specialists, under the discretion afforded the Secretary in section 6405(c), and to ensure that those items or services are ordered or referred by qualified physicians or eligible professionals, we are requiring at a new § 424.507(b), the following:

• In Part B claims for covered services of laboratories, imaging suppliers, and specialists that require the identification of the ordering or referring supplier, and with the exception noted below, the ordering or referring supplier be a physician or an eligible professional with an approved enrollment record in PECOS (see the exception below), and be identified in the claim by his or her legal name and by his or her own NPI (that is, by the NPI that was assigned to him or her by the National Plan and Provider Enumeration System (NPPES) as an Entity Type 1 (an individual).

We are requiring at a new § 424.507(c) that Medicare contractors will reject claims from providers and suppliers for the above-described covered ordered or referred items or services if the legal names and the NPIs are not reported in the claims or, with the exception noted below, if the ordering or referring supplier does not have an approved enrollment record in PECOS.

We are requiring at a new § 424.507(d) that Medicare contractors may deny a claim submitted by a Medicare beneficiary for the above-described ordered or referred covered items and services if the ordering or referring supplier is not identified by his or her legal name or, with the exception noted below, if the ordering or referring supplier does not have an approved enrollment record in PECOS.

Our continuing outreach efforts stress the need for those who order and refer to have approved enrollment records in PECOS.

While we are not including additional categories of ordered or referred covered items or services in this IFC (such as Part B drugs), we reserve the right to apply these requirements to additional categories through future rulemaking once the policies have been developed. We are considering proposing the requirements for covered prescribed Part B drugs within the next year.

A physician or eligible professional who orders or refers must be enrolled in the Medicare program by having an enrollment record in an approved status in PECOS, even if he or she is enrolled only for the purposes of ordering and referring. To ensure that orders and referrals for Medicare beneficiaries are written by qualified physicians and eligible professionals, it is necessary that their credentials be verified; such verification can occur only as part of the Medicare provider/supplier enrollment process. PECOS, as described earlier in this preamble, is the national Medicare FFS provider and supplier enrollment repository. All providers and suppliers who enrolled in Medicare within the past 6 years, as well as those who enrolled more than 6 years ago and who have submitted updates to their enrollment information within the past 6 years, have enrollment records in PECOS that contain verified credentials. Those who enrolled more than 6 years ago and who have not updated their enrollment information in the past 6 (or more) years will need to submit enrollment applications to Medicare to establish enrollment records in PECOS. They may do this by filling out the paper Medicare provider enrollment applications (using the appropriate form(s) from the CMS–855 series of forms) and mailing the completed application(s) to the appropriate Medicare enrollment contractor or by using Internet-based PECOS to submit their enrollment application to the Medicare enrollment contractor over the Internet. With the implementation in 2009 of the claims processing edits to ensure the NPI and the name reported in claims to identify the ordering or referring suppliers matched information in PECOS for physicians and professionals of a profession eligible to order and refer, many enrolled physicians and eligible professionals who do not have enrollment records in PECOS are submitting enrollment applications in order to establish those enrollment records. We expect that most, if not all, of them will have submitted enrollment applications before the end of 2010, including those who are enrolling solely to continue to order and refer. A physician or eligible professional who is deceased, retired, or excluded from the Medicare program, or who otherwise would not have an approved enrollment record in PECOS, would not be eligible to order or refer items or services for Medicare beneficiaries. Please note the following exception for physicians and eligible professionals who do not have an approved enrollment record in PECOS:

Under section 1802(b) of the Act and the implementing regulations at 42 CFR 405.400 *et seq.,* physicians and non-physician practitioners can opt out of the Medicare program and enter into private contracts with Medicare beneficiaries. By entering into these types of contracts, these suppliers do not bill the Medicare program for services that they furnish to Medicare beneficiaries. We require that physicians and eligible professionals who have properly filed an appropriate affidavit with a Medicare contractor in order to opt out of the Medicare program be required to be identified in claims by their names and their NPIs if they order or refer covered items or services for Medicare beneficiaries. We are creating an exception to the requirement that ordering and referring suppliers be required to have an approved enrollment record in PECOS for those physicians and non-physician practitioners who have validly opted out of the Medicare program. Therefore, physicians and non-physician practitioners who have validly opted out of Medicare are eligible to order and refer covered items and services for Medicare beneficiaries. If they have properly completed the appropriate affidavit in order to opt out of Medicare, they will have records in PECOS that contain their NPIs and that indicate that they have validly opted out of the Medicare program. In January 2009, there were approximately 10,000 physicians and eligible professionals who had opted out of the Medicare program. Compared to the more than 800,000 enrolled physicians and eligible professionals, there are relatively few physicians and eligible professionals who have opted out of Medicare.

Accordingly, the physicians or eligible professional that opted out must meet the following:

• A currently enrolled physician or eligible professional who does not have an enrollment record in PECOS is required to establish an enrollment record in PECOS so that he or she can order and refer covered items or services for Medicare beneficiaries. A physician or eligible professional who has validly opted out of the Medicare program will have a valid opt-out record in PECOS and is not required to submit an enrollment application.

• A physician or eligible professional who is employed by the Public Health Service, the Department of Defense, or the Department of Veterans Affairs is required to have an approved enrollment record in PECOS in order to order and refer covered items and services for Medicare beneficiaries, even though he or she would not be

submitting claims to Medicare for services furnished to Medicare beneficiaries. We require, therefore, that these physicians and eligible professionals enroll in Medicare solely to order and refer (and not to be paid for services furnished to Medicare beneficiaries).

- A dentist furnishes many services that are not covered by Medicare and, as a result, most dentists are not enrolled in Medicare. However, a dentist may order services for patients who are Medicare beneficiaries, such as sending oral specimens to laboratories for testing. Doctors of dental medicine or dental surgery are considered physicians and we require that they have approved enrollment records in PECOS if they order or refer covered items or services for patients who are Medicare beneficiaries.
- A pediatrician may treat Medicare beneficiaries (for example, those of any age who are enrolled in the Medicare end-stage renal disease (ESRD) program or those who are entitled to Medicare benefits under other Federal programs), although the volume of such patients is generally so low that most pediatricians are not enrolled in Medicare. We require that a pediatrician have an approved enrollment record in PECOS if he or she orders or refers covered items or services for patients who are Medicare beneficiaries.
- Residents and interns order and refer covered items and services for Medicare beneficiaries. Prior to the implementation of the NPI, residents and interns were identified in claims as the ordering or referring providers by surrogate UPINs. Interns are not issued medical licenses by States; therefore, they are not eligible to enroll in Medicare. Residents have medical licenses if they practice in States that issue medical licenses to residents; as a result, some residents are eligible to enroll in Medicare. Due to the variances in licensure and the necessity for interns and residents to be able to continue to order and refer covered items and services for Medicare beneficiaries, we require that the teaching physician—not the resident or intern—be identified in the claim as the ordering or referring provider whenever a resident or intern orders or refers.

These ordering and referring requirements, when implemented, will allow us to uniquely identify the ordering and referring supplier in claims (except when the teaching physician is identified as the ordering or referring supplier in situations where an intern or a resident ordered or referred) and assure, because of the requirement to have an approved enrollment or valid opt out record in PECOS, that the ordering and referring supplier is qualified to order and refer items and services for Medicare beneficiaries. This will enable us to edit claims for ordering and referring suppliers who do not have approved enrollment records in PECOS (that is, those who are excluded, deceased, or retired, and those whose Medicare billing privileges have been terminated through exclusion, revocation, or otherwise), and those who have voluntarily terminated their relationship with Medicare or who have validly opted out of Medicare.

Further, we are requiring that Part A claims for covered ordered Part A and Part B home health services must include the legal name and the NPI of the ordering supplier, who must be a physician. We are requiring that Part B claims for covered, ordered, and referred Part B items and services (excluding Part B drugs) must include the legal name and the NPI of the ordering or referring supplier. We place these same requirements (except for the NPI) on claims submitted by Medicare beneficiaries for these same ordered or referred items and services. Although suppliers are required to submit claims on behalf of beneficiaries under the mandatory claim submission policy at section 1848(g)(4)(A) of the Act, we recognize that beneficiaries may submit claims to Medicare for payment. In order to fully enforce the ordering and referring requirement established by section 6405 of the Affordable Care Act, we plan to deny a beneficiary claim for a service when the legal name of the ordering or referring supplier is not included on the claim.

We believe that these requirements will promote quality health care services for Medicare beneficiaries because orders and referrals would be written by qualified physicians and eligible professionals, as their credentials would have been verified as part of the Medicare provider/supplier enrollment process.

Additionally, we believe these requirements will eliminate the abusive practice of reporting identifiers in claims as being assigned to specific ordering or referring suppliers when, in fact, those identifiers had not been assigned to those specific ordering or referring suppliers. As a result, our requirements should eliminate these types of problematic claims and ensure the qualifications of the ordering and referring suppliers.

Our requirements will enable us to know the identity of the individual who ordered or referred and, if appropriate, we could establish edits to check for over-ordering specific items or services, over-referring specific services, and/or over-ordering or over-referring to specific providers of services and suppliers.

Furthermore, these requirements support our existing authority, at § 424.516(f), under which the ordering and referring suppliers, and those providers of services and suppliers who furnish covered items or services based on orders or referrals, are required to maintain documentation (to include the NPI) that supports the orders and referrals for 7 years in order to maintain an active enrollment status in the Medicare program.

Lastly, these requirements may lead to a reduction in inappropriate Medicare payments.

We are aware that, in some cases, Medicare beneficiaries may be patients of physicians or eligible professionals who do not have approved enrollment records in PECOS, or may be patients of professionals who are not of a profession that is eligible to order or refer, and that these physicians and professionals may be ordering and referring covered items and services for these Medicare beneficiaries at this time. We expect to conduct outreach activities to educate Medicare beneficiaries, as well as Medicare providers of services and suppliers who furnish covered items and services based on orders and referrals, so that we can eliminate situations where those providers of services and suppliers who would be furnishing covered ordered and referred items and services would not be paid for those covered items or services because their claims failed the edits.

Finally, we believe that the requirements will address the recommendations offered by the DHHS OIG report titled, "Medicare Payments in 2007 for Medical Equipment and Supply Claims with Invalid or Inactive Referring Physician Identifiers, OEI–04–08–00470, February 2009." Specifically, the OIG recommended that CMS:

(1) Determine why Medicare claims with identifiers associated with deceased referring physicians continue to be paid;

(2) Implement claims-processing system changes to ensure that NPIs for both referring physicians and suppliers be listed on medical equipment and supply claims are valid and active.

(3) Emphasize to suppliers the importance of using accurate NPIs for both referring physicians and suppliers when submitting Medicare claims; and

(4) Determine the earliest date to end the provision that allows suppliers to submit claims without referring

physician NPIs while maintaining beneficiary access to services.

With respect to recommendation (4), we began requiring Medicare claims to identify ordering and referring providers by NPIs beginning May 23, 2008. If the provider of services or the supplier submitting the claim for the covered ordered or referred items or services could not determine the NPI of the ordering or referring supplier, we permitted the provider of services or the supplier submitting the claim to use its own NPI in place of the NPI of the ordering or referring provider. These types of claims for DMEPOS items now fail the claims processing edits that were implemented in 2009. Medicare-enrolled physicians and professionals are required to have NPIs. The NPI Registry (available at *https://nppes.cms.hhs.gov/NPPES/NPIRegistryHome.do*) enables anyone with a computer with Internet access to look up a health care provider's NPI by name or NPI, and the NPPES downloadable file (downloadable from *http://nppesdata.cms.hhs.gov/CMS_NPI_files.html*) contains the NPIs of all health care providers who have active NPIs, as well as identifying information about the health care providers that is publicly disclosable under the Freedom of Information Act. (The National Plan and Provider Enumeration System Data Dissemination Notice, published in the May 30, 2007 **Federal Register**, further describes the NPI Registry and the NPPES downloadable file.) The existing claims processing edits described earlier in this preamble check to ensure that the NPI reported on a Part B claim for ordered or referred covered items or services (excluding Part B home health services and Part B drug claims) belongs to the ordering or referring supplier whose name is also reported in those claims, and not to the supplier who submitted the claim. As stated previously, the provisions of section 6405 of the Affordable Care Act are effective July 1, 2010.

C. Requirement for Physicians, Other Suppliers, and Providers to Maintain and Provide Access to Documentation on Referrals to Programs at High Risk of Waste and Abuse

1. Background

On November 19, 2008, we published a final rule with comment titled, "Revisions to Payment Policies Under the Physician Fee Schedule and Other Revisions to Part B for CY 2009; Revisions to the Amendment of the E–Prescribing Exemption for Computer Generated Facsimile Transmissions; and the Competitive Acquisition for Certain Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)" in the **Federal Register**. In this IFC, we established § 424.516(f) to require providers and suppliers to maintain ordering and referring documentation, including the NPI, received from a physician or eligible non-physician practitioner. We also established in § 424.516(f) that physicians and eligible professionals are required to maintain written ordering and referring documentation for 7 years from the date of service. Finally, we established in § 424.535(a)(10) that failure to comply with the documentation requirements specified in § 424.516(f) is a reason for revocation.

2. Provisions of the Affordable Care Act

Section 6406 of the Affordable Care Act amends section 1866(a)(1) of the Act and added a new subparagraph (W) which requires providers to agree to "maintain and, upon request of the Secretary, provide access to documentation relating to written orders or requests for payment for durable medical equipment, certifications for home health services, or referrals for other items or services written or ordered by the provider under this title, as specified by the Secretary."

In addition, section 6406 of the Affordable Care Act amended section 1842(h) of the Act by adding a new paragraph which states, "The Secretary may revoke enrollment, for a period of not more than one year for each act, for a physician or supplier under section 1866(j) if such physician or supplier fails to maintain and, upon request of the Secretary, provide access to documentation relating to written orders or requests for payment for durable medical equipment, certifications for home health services, or referrals for other items or services written or ordered by such physician or supplier under this title, as specified by the Secretary."

Section 6406(b)(3) of the Affordable Care Act amends section 1866(a)(1) of the Act to require that providers and suppliers maintain and, upon request, provide to the Secretary, access to written or electronic documentation relating to written orders or requests for payment for durable medical equipment, certifications for home health services, or referrals for other items or services written or ordered by the provider as specified by the Secretary. Section 6406(b)(3) does not limit the authority of the Office of Inspector General to fulfill the Inspector General's responsibilities in accordance with applicable Federal law.

3. Requirements of This IFC

In our requirements, in our revision of § 424.516(f), we are replacing the term "eligible non-physician practitioner" with "eligible professional." This change is consistent with our definition of "eligible professional" and correctly identifies the professionals who, in addition to physicians, are eligible to order and refer.

At this time, we are expanding § 424.516(f) to include requirements for documentation and access to documentation related to orders and referrals for covered home health, laboratory, imaging, and specialist services. Section 424.516(f) currently includes requirements for documentation and access to documentation for orders for DMEPOS. We reserve the right to, at a future date, publish proposed requirements for documentation and access to documentation for additional items and services that may be ordered or referred under title XVIII and that are programs of high risk of waste and abuse.

We are revising the existing § 424.516(f) to now read "Maintaining and providing access to documentation." A provider or a supplier who furnishes covered ordered DMEPOS or referred home health, laboratory, imaging, or specialist services is required to maintain documentation for 7 years from the date of service and, upon the request of CMS or a Medicare contractor, to provide access to that documentation. The documentation includes written and electronic documents (including the NPI of the physician who ordered the home health services and the NPI of the physician or the eligible professional who ordered or referred the DMEPOS, laboratory, imaging, or specialist services) relating to written orders and requests for payments for items of DMEPOS and home health, laboratory, imaging, and specialist services. A physician who ordered home health services and a physician and an eligible professional who ordered or referred items of DMEPOS or laboratory, imaging, and specialist services is required to maintain documentation for 7 years from the date of the order, certification, or referral and, upon request of CMS or a Medicare contractor, to provide access to that documentation. The documentation includes written and electronic documents (including the NPI of the physician who ordered the home health services and the NPI of the physician or the eligible professional who ordered or referred the DMEPOS, laboratory, imaging, or specialist services) relating

to written orders or requests for payments for items of DMEPOS and home health, laboratory, imaging, and specialist services. Note that we are clarifying that the documentation includes both written and electronic documentation.

We are revising § 424.535(a)(10) to read, "The Centers for Medicare & Medicaid Services" (CMS) may revoke enrollment, for a period of not more than one year for each act, for a provider or a supplier under section 1866(j) of the Act if such provider or supplier fails to meet the requirements of § 424.516(f). Providers and suppliers will continue to have appeal rights afforded to them in accordance with part 498.

III. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

IV. Waiver of Proposed Rulemaking

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on the proposed rule. The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substances of the proposed rule or a description of the subjects and issues involved. This procedure can be waived, however, if an agency finds good cause that a notice-and-comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued. The NPI requirements set forth in this IFC are necessary to implement the data reporting requirements in section 1128J(e) of the Act, as amended by section 6402(a) of the Affordable Care Act, which require that the Secretary promulgate a regulation to implement this requirement no later than January 2011. Moreover these NPI requirements are needed to implement the Medicare requirements specified in section 6405 of the Affordable Care Act that are effective July 1, 2010. Section 6406 of the Affordable Care Act was effective January 1, 2010. It is imperative that the regulatory provisions be set forth as soon as possible to deliver the guidance necessary to enact the provisions.

In addition, several of these provisions may be issued as an IFC because they fall under the exception in Medicare to the section 1871(b)(1)(B) of the Act rulemaking requirements. Section 1871 of the Act generally requires that we issue a notice of proposed rulemaking prior to issuing a final rule under the Medicare program. However, section 1871(b)(1)(b) provides that the Secretary is not required to issue a notice of proposed rulemaking before issuing a final rule if "* * * a statute establishes a specific deadline for the implementation of a provision and the deadline is less than 150 days after the date of the enactment of the statute in which the deadline is contained." Section 6405 establishes an effective date of July 1, 2010, which is less than 150 days from the date of enactment of this statute. Moreover, section 6406 establishes an effective date of January 1, 2010, which has already passed.

We do not believe that the portions of this rule not exempted from notice and comment rulemaking pursuant to section 1871(b)(1)(B) of the Act add any new burdens for Medicare or Medicaid providers and suppliers. Both Medicare and Medicaid programs generally require unique provider identifiers, and thus delaying this rule is unnecessary. Finally, a delay in implementing these provisions would be contrary to the public interest and to CMS' efforts to reduce and eliminate fraud and abuse in the Medicare and Medicaid programs. For these reasons, we find good cause to waive the notice of proposed rulemaking and to issue this final rule on an interim basis. We are providing a 60-day comment period.

V. Collection of Information Requirements

In accordance with section 3507(j) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection included in this interim final rule with comment period will be submitted for emergency approval to the Office of Management and Budget (OMB). The revised information collection requirements associated with 0938–0685, 0938–0931, and 0938–0999 (see sections V.A. and V.D. of this IFC) will not be effective until approved by OMB.

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs):

A. ICRs Regarding National Provider Identifier (NPI) on All Medicare Enrollment Applications and Claims (§ 424.506)

Section 424.506(b)(1) states that providers and suppliers who are eligible for NPIs be required to report their NPIs on their enrollment applications for Medicare. Similarly, § 424.506 (b)(2) states that if providers or suppliers enrolled in Medicare prior to obtaining NPIs and their NPIs are not in their enrollment records, they must submit enrollment applications containing their NPIs.

The burden associated with the requirements in § 424.506(b) is the time and effort necessary for a provider or a supplier to apply for an NPI and the time and effort necessary to report the NPIs on their enrollment applications for Medicare.

Sections § 424.510 and § 424.515 state that providers and suppliers must submit enrollment information on the applicable enrollment application and update, resubmit, and recertify the accuracy of their enrollment information every 5 years. In addition, § 424.516 lists reporting requirements for providers and suppliers. To submit enrollment information for an initial application (even if enrolling solely to order and refer), a change of information, or to respond to a revalidation request, a provider or supplier must complete and submit the applicable CMS–855 enrollment application or complete and submit the enrollment application over the Internet using Internet-based PECOS. Although we are unable to quantify the number, we do not believe that a significant number of physicians and eligible professionals will enroll in Medicare solely to order and refer. The burden associated with the enrollment requirements found in § 424.510,

§ 424.515, and§ 424.516 is the time and effort necessary to complete and submit applicable Medicare enrollment applications. While this burden is subject to the PRA, it is currently approved under existing OMB control numbers (OCN). Specifically, the burden associated with obtaining an NPI is currently approved under OCN 0938–0931. The burden associated with submitting initial Medicare enrollment applications and updating Medicare enrollment information to include NPI is approved under OCN 0938–0685 (Applications CMS–855 A, B, I, and R) 0938–1056 (Application CMS–855 S).

Section 424.506(b)(1) states that providers and suppliers who are enrolled in Medicare must report their National Provider Identifiers (NPIs) and the NPIs of any other providers or suppliers who are required to be identified in their claims on all paper and electronic claims that they send to Medicare. The burden associated with this requirement is the time and effort necessary to complete and submit a claim form. While this requirement is subject to the PRA, the associated burden is currently approved under OCN 0938–0999.

B. ICRs Regarding Ordering and Referring Covered Items and Services for Medicare Beneficiaries (§ 424.507)

Section 424.507 states that to receive payment for covered Part A or Part B home health services, the claim must contain the legal name and the NPI of the ordering physician; and to receive payment for covered items of DMEPOS, and certain other covered Part B items or services (excluding Part B drugs), the claim must contain the legal name and the NPI of the ordering or referring physician or eligible professional. The burden associated with these requirements is the time and effort necessary to submit a claim with the required information. While these requirements are subject to the PRA, the associated burden is currently approved under OCN 0938–0999.

C. ICRs Regarding Additional Provider and Supplier Requirements for Enrolling and Maintaining Active Enrollment Status in the Medicare Program (§ 424.516)

Section 424.516(f)(1) discusses the documentation requirements for providers and suppliers. A provider or supplier is required for 7 years from the date of service to maintain and upon request of CMS or a Medicare contractor, provide access to documentation, including the NPI of the physician or the eligible professional who ordered or referred the item or service, relating to written orders or requests for payments for items of DMEPOS and referrals for home health, laboratory, imaging, and specialist.

Similarly, § 424.516(f) discusses the documentation requirements for providers and suppliers. At § 424.516(f)(1), providers and suppliers are required for 7 years from the date of service to maintain and, upon request of CMS or a Medicare contractor, provide access to documentation, including the NPI of the physician or the eligible professional who ordered or referred the item or service, relating to written orders or requests for payments for items of DMEPOS and referrals for home health, laboratory, imaging, and specialist. At § 424.516(f)(2), physicians and eligible professionals are required for 7 years from the date of service to maintain and, upon request of CMS or a Medicare contractor, provide access to written and electronic documentation relating to written orders or certifications for items of DMEPOS and home health, laboratory, imaging, and specialist services, written, ordered, referred by such physician or non-physician practitioner.

The burden associated with the requirements in § 424.516(f) is the time and effort necessary to both maintain documentation on file and to furnish the information upon request to CMS or a Medicare contractor. While the requirement is subject to the PRA, we believe the associated burden is exempt. As discussed in the final rule that was published November 19, 2008 (73 FR 69726), we believe the burden associated with maintaining documentation and furnishing it upon request is a usual and customary business practice and thereby exempt from the PRA under 5 CFR 1320.3(b)(2).

D. ICRs Regarding the Reporting of National Provider Identifier by Medicaid Providers (§ 431.507(b)(5))

Section 431.107(b)(5) states that a Medicaid provider has to furnish its NPI (if eligible for an NPI) to its State agency and include its NPI on all claims submitted under the Medicaid program. The burden associated with the Medicaid requirements in § 431.107(b)(5) is the time and effort necessary for a provider to report the NPIs to the State agency and on claims submitted to the Medicaid program.

We are in the process of revising the information collection requirements contained in OCNs 0938–0685, 0938–0931, and 0938–0999 in accordance with the provisions of this rulemaking. These information collection requirements will be sent to OMB for review and approval in accordance with the emergency procedures of the PRA and will not go into effect until approved by OMB.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: CMS Desk Officer, [CMS–6010–IFC]

Fax: (202) 395–6974; or E-mail: *OIRA_submission@omb.eop.gov*

VI. Regulatory Impact Analysis

We have examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), and Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804 *et seq.*). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts; and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). Virtually all providers and suppliers who wish to enroll in Medicare and Medicaid programs have already obtained NPIs. Most enrolled Medicare and Medicaid providers and suppliers who will be affected by the statutory and regulatory requirements are already meeting those requirements. For example, Medicare providers and suppliers have been reporting their NPIs on their enrollment applications for 4 years and have been using NPIs in their paper and electronic Medicare claims as well as electronic Medicaid claims for 2 years. The majority of suppliers who submit claims for ordered or referred DMEPOS and laboratory, imaging, and specialist services are ensuring that their claims meet the requirements of this IFC. In addition, the majority of Medicare physicians and eligible professionals who order and refer but who do not have approved enrollment records in PECOS are aware of the need to establish those records and many have already submitted their enrollment

applications to Medicare in order to do so. Medicare DMEPOS suppliers and those physicians and eligible professionals who order DMEPOS are already maintaining documentation in accordance with the requirements of this IFC. Other Medicare providers and suppliers who will be required to do so by this IFC are likely already in full or partial compliance as part of their routine business operations. Therefore, we do not believe this rule reaches the economic threshold and thus is not considered a major rule.

The RFA requires agencies to analyze options for regulatory relief for small businesses. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and government agencies. Most hospitals and most other providers and suppliers are small entities, either by nonprofit status or by having revenues of $6.5 to $31.5 million in any one year. Individuals and States are not included in the definition of a small entity. We are not preparing an analysis for the RFA because we have determined that this rule will not have a significant economic impact on a substantial number of small entities. We maintain that this final rule would not have an adverse impact on small entities.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. We are not preparing an analysis for section 1102(b) of the Act because we have determined that this final rule will not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 also requires that agencies assess anticipated costs and benefits before issuing any rule that may result in expenditure in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of $135 million. This rule does not mandate expenditures by either the governments mentioned or the private sector; therefore, no analysis is required. Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications.

Since this regulation does not impose significant costs on State or local governments, the requirements of E.O. 13132 are not applicable. In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

B. Alternatives Considered

Since this final rule is a codification of statutory provisions found in the Affordable Care Act, we did not consider alternatives to this process.

List of Subjects

42 CFR Part 424

Emergency medical services, Health facilities, Health professions, Medicare, Reporting and recordkeeping requirements.

42 CFR Part 431

Grant programs-health, Health facilities, Medicaid, Privacy, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 424—CONDITIONS FOR MEDICARE PAYMENT

■ 1. The authority citation for part 424 continues to read as follows:

Authority: Secs. 1102 and 1871 of the Social Security Act (42 U.S.C. 1302 and 1395hh).

■ 2. Section 424.506 is added to read as follows:

§ 424.506 National Provider Identifier (NPI) on all enrollment applications and claims.

(a) *Definition. Eligible professional* means any of the professionals specified in section 1848(k)(3)(B) of the Act.

(b) *Enrollment requirements.* (1) A provider or a supplier who is eligible for an NPI must report its National Provider Identifier (NPI) on its Medicare enrollment application.

(2) If a provider or a supplier who is eligible for an NPI enrolled in the Medicare program prior to obtaining an NPI and the provider's or the supplier's NPI is not in the provider's or the supplier's Medicare enrollment record, the provider or the supplier must submit a Medicare enrollment application that contains the NPI.

(3) A physician or an eligible professional who has validly opted out of the Medicare program does not need to submit an enrollment application.

(c) *Claims reporting requirements.* (1) A provider or a supplier who is enrolled in Medicare and who submits a paper or an electronic claim to Medicare include its National Provider Identifier (NPI) and the NPI(s) of any other provider(s) or suppliers(s) who is required to be identified.

(2) A Medicare beneficiary who submits a claim for service to Medicare—

(i) Must include the legal name of any provider or supplier who is required to be identified in that claim; and

(ii) May, if known to the beneficiary, include the National Provider Identifier (NPI) of any provider or supplier who is required to be identified in that claim.

(3) A Medicare contractor will reject a claim from a provider or a supplier if the required NPI(s) is not reported.

■ 3. Section 424.507 is added to read as follows:

§ 424.507 Ordering and referring covered items and services for Medicare beneficiaries.

(a) *Conditions for payment of claims for ordered or referred covered Part B items and services (excluding home health services described in § 424.507(b) and Part B drugs).* (1) *Part B provider and supplier claims.* To receive payment for ordered or referred covered Part B items and services (excluding home health services described in § 424.507(b), and Part B drugs), a provider's or supplier's must meet all of the following requirements:

(i) The Part B items and services must have been ordered or referred by a physician or, when permitted, an eligible professional (as defined in § 424.506(a) of this part).

(ii) The claim from the Part B provider or supplier must contain the legal name and the National Provider Identifier (NPI) of the physician or the eligible professional (as defined in § 424.506(a) of this part) who ordered or referred.

(iii) The physician or the eligible professional who ordered or referred must have an approved enrollment record or a valid opt-out record in the Provider Enrollment, Chain and Ownership System (PECOS).

(iv) If the items or services were ordered or referred by a resident or an intern, the claim must identify the teaching physician as the ordering or referring supplier. The claim must identify the teaching physician by his or her legal name and NPI and he or she must have an approved enrollment record or a valid opt-out record in PECOS.

(2) *Part B beneficiary claims.* To receive payment for ordered or referred covered Part B items and services (excluding home health services described in § 424.507(b), and Part B

drugs), a beneficiary's claim must meet all of the following requirements:

(i) The Part B items and services must have been ordered or referred by a physician or, when permitted, an eligible professional (as defined in § 424.506(a) of this part).

(ii) The claim must contain the legal name of the physician or the eligible professional (as defined in § 424.506(a) of this part) who ordered or referred.

(iii) The physician or the eligible professional who ordered or referred must have an approved enrollment record or a valid opt-out record in the Provider Enrollment, Chain and Ownership System (PECOS).

(iv) If the items or services were ordered or referred by a resident or an intern, the claim must identify the teaching physician as the ordering or referring supplier. The claim must identify the teaching physician by his or her legal name and he or she must have an approved enrollment record or a valid opt-out record in PECOS.

(b) *Conditions for payment of claims for ordered covered home health services.* (1) *Home health provider claims.* To receive payment for ordered, covered Part A or Part B home health services, a provider's home health services claim must meet all of the following requirements:

(i) The Part A or Part B home health services must have been ordered by a physician;

(ii) The claim from the provider of home health services must contain the legal name and the National Provider Identifier (NPI) of the ordering physician;

(iii) The ordering physician must have an approved enrollment record or a valid opt-out record in the Provider Enrollment, Chain, and Ownership System (PECOS); and

(iv) If the services were ordered by a resident or an intern, the claim must identify the teaching physician as the ordering or referring physician. The claim must identify the teaching physician by his or her legal name and NPI and he or she must have an approved enrollment record or a valid opt-out record in PECOS.

(2) *Home health beneficiary claims.* To receive payment for ordered covered Part A or Part B home health services, a beneficiary's home health services claim must meet all of the following requirements:

(i) The Part A or Part B home health services must have been ordered by a physician.

(ii) The claim from the provider of home health services must contain the legal name of the ordering physician.

(iii) The ordering physician must have an approved enrollment record or a valid opt-out record in the Provider Enrollment, Chain, and Ownership System (PECOS).

(iv) If the services were ordered by a resident or an intern, the claim must identify the teaching physician as the ordering or referring physician. The claim must identify the teaching physician by his or her legal name and he or she must have an approved enrollment record or a valid opt-out record in PECOS.

(c) A Medicare contractor will reject a claim from a provider or a supplier for covered services described in paragraphs (a) and (b) of this section if the claim does not meet the requirements of paragraph (a)(1) and (b)(1) of this section, respectively.

(d) A Medicare contractor may deny a claim from a Medicare beneficiary for covered items or services described in paragraphs (a) and (b) of this section if the claim does not meet the requirements of paragraphs (a)(2) and (b)(2) of this section, respectively.

■ 4. Section 424.516 is amended by revising paragraph (f) to read as follows:

§ 424.516 Additional provider and supplier requirements for enrolling and maintaining active enrollment status in the Medicare program.

* * * * *

(f) *Maintaining and providing access to documentation.* (1) A provider or a supplier who furnishes covered ordered DMEPOS or referred home health, laboratory, imaging, or specialist services is required to maintain documentation for 7 years from the date of service and, upon the request of CMS or a Medicare contractor, to provide access to that documentation. The documentation includes written and electronic documents (including the NPI of the physician who ordered the home health services and the NPI of the physician or the eligible professional who ordered or referred the DMEPOS, laboratory, imaging, or specialist services) relating to written orders and requests for payments for items of DMEPOS and home health, laboratory, imaging, and specialist services.

(2) A physician who ordered home health services and a physician and an eligible professional who ordered or referred items of DMEPOS or laboratory, imaging, and specialist services is required to maintain documentation for 7 years from the date of the order, certification, or referral and, upon request of CMS or a Medicare contractor, to provide access to that documentation. The documentation includes written and electronic documents (including the NPI of the physician who ordered the home health services and the NPI of the physician or the eligible professional who ordered or referred the DMEPOS, laboratory, imaging, or specialist services) relating to written orders or requests for payments for items of DMEPOS and home health, laboratory, imaging, and specialist services.

■ 5. Section 424.535 is amended by revising (a)(10) to read as follows:

§ 424.535 Revocation of enrollment and billing privileges in the Medicare program.

(a) * * *

(10) *Failure to document or provide CMS access to documentation.* (i) The provider or supplier (as described in section 1866(j) of the Act) did not comply with the documentation or CMS access requirements specified in § 424.516(f) of this subpart.

(ii) A provider or supplier that meets the revocation criteria specified in paragraph (a)(10)(i) of this section, is subject to revocation for a period of not more than 1 year for each act of noncompliance.

* * * * *

PART 431—STATE ORGANIZATION AND GENERAL ADMINISTRATION

■ 6. The authority citation for part 431 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act, (42 U.S.C. 1302).

■ 7. Section 431.107 is amended by adding a new paragraph (b)(5) to read as follows:

§ 431.107 Required provider agreement.

* * * * *

(b) * * *

(5)(i) Furnish to the State agency its National Provider Identifier (NPI) (if eligible for an NPI); and

(ii) Include its NPI on all claims submitted under the Medicaid program.

Dated: April 28, 2010.

Marilyn Tavenner,

Acting Administrator, Centers for Medicare & Medicaid Services.

Approved: April 29, 2010.

Kathleen Sebelius,

Secretary.

Authority: Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance; and Program No. 93.774, Medicare—Supplementary Medical Insurance Program, and Program No. 93.778, Medical Assistance Program.

[FR Doc. 2010–10505 Filed 4–30–10; 4:15 pm]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 149

RIN 0991–AB64

Early Retiree Reinsurance Program

AGENCY: Office of the Secretary, HHS.

ACTION: Interim final rule with comment period.

SUMMARY: This interim final rule with comment period (IFC) implements the Early Retiree Reinsurance Program, which was established by section 1102 of the Patient Protection and Affordable Care Act (the Affordable Care Act). The Congress appropriated funding of $5 billion for the temporary program. Section 1102(a)(1) requires the Secretary to establish this temporary program not later than 90 days after enactment of the statute, which is June 21, 2010. The program ends no later than January 1, 2014. The program provides reimbursement to participating employment-based plans for a portion of the cost of health benefits for early retirees and their spouses, surviving spouses and dependents. The Secretary will reimburse plans for certain claims between $15,000 and $90,000 (with those amounts being indexed for plan years starting on or after October 1, 2011). The purpose of the reimbursement is to make health benefits more affordable for plan participants and sponsors so that health benefits are accessible to more Americans than they would otherwise be without this program.

DATES: *Effective Date:* These regulations are effective on June 1, 2010.

Comment date: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. EST on June 4, 2010.

ADDRESSES: In commenting, please refer to file code DHHS–9996–IFC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed).

- *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions on the home page.
- *By regular mail.* You may mail written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: DHHS–9996–IFC, P.O. Box 8014, Baltimore, MD 21244–8014.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

- *By express or overnight mail.* You may send written comments to the following address only: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: DHHS–9996–IFC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.
- *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address, please call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by following the instructions at the end of the "Collection of Information Requirements" section in this document.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: James Slade, (410) 786–1073, for information regarding the Purpose and Basis, Requirements for Eligible Employment-Based Plans, Use of Reimbursement Amounts, Appeals, and Disclosure of Data Inaccuracies.

David Mlawsky, (410) 786–6851, for information regarding the Definitions, Reinsurance Amounts, Reimbursement Methods, Including Provision of Necessary Information, and Change of Ownership Requirements.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments.* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all electronic comments received before the close of the comment period on the following public Web site as soon as possible after they have been received: *http://www.regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will be available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at Room 445–G, Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, call 1–800–743–3951.

I. Background

A. Overview of the Early Retiree Reinsurance Program Enacted as Part of the Patient Protection and Affordable Care Act

On March 21, 2010, the Congress passed the Patient Protection and Affordable Care Act (the Affordable Care Act) (Pub. L. 111–148), which was signed into law on March 23, 2010. Included in this health insurance reform law is a provision that establishes the temporary Early Retiree Reinsurance Program. This provision addresses the recent erosion in the number of employers providing health coverage to early retirees. People in the early retiree age group often face difficulties obtaining insurance in the individual market because of advanced age or chronic conditions that make coverage unaffordable and inaccessible. The Early Retiree Reinsurance Program provides needed financial help for employer-based plans to continue to provide valuable coverage to plan participants, and provides financial relief to plan participants.

The Early Retiree Reinsurance Program provides reimbursement to participating sponsors for a portion of the costs of providing health coverage to early retirees (and eligible spouses, surviving spouses, and dependents of such retirees). Section 1102(a)(2)(B) of

the Affordable Care Act defines "employment-based plan" to include a group benefits plan providing health benefits that is maintained by private employers, State or local governments, employee organizations, voluntary employees' beneficiary association, a committee or board of individuals appointed to administer such plan, or a multiemployer plan (as defined by Employee Retirement Income Security Act or ERISA). Section 1102 does not differentiate between health benefits provided by self-funded plans or through the purchase of insurance.

Section 1102(a)(1) requires the Secretary of HHS (the Secretary) to establish the program within 90 days of enactment of the law, which is June 21, 2010. We expect this program to be established by June 1, 2010. By law, the program will expire on January 1, 2014. Funding for the program is limited to $5 billion.

II. Provisions of the Interim Final Rule

This regulation establishes 45 CFR part 149, "Requirements for the Early Retiree Reinsurance Program." This part implements section 1102 of the Affordable Care Act, which requires the Secretary to provide reimbursement to sponsors with certified plans for a portion of the cost of health benefits for early retirees and their spouses, surviving spouses and dependents, provided funds remain available. In part 149, we established new subparts A through H. These new subparts set forth the framework for implementing the Early Retiree Reinsurance Program effective June 1, 2010 through January 1, 2014. We are implementing the statutory requirements of the program as follows:

A. General Provisions (Subpart A)

1. Purpose and Basis (§ 149.1)

In this section, we provide the statutory authority for promulgating the regulation.

2. Definitions (§ 149.2)

Section 1102(a) of the Affordable Care Act (also referred to as the "statute") provides definitions for three specific terms. One of these terms is the term "employment-based plan", which the statute defines as a "group benefits plan providing health benefits" that satisfies certain conditions. The statute at section 1102(a)(1) also specifies that under the program, the Secretary shall provide reimbursement to participating employment-based plans. However, a plan typically constitutes merely an arrangement to provide benefits, as opposed to a discrete entity to which payments can be directly made or sent. Thus, the regulation interprets this provision to require reimbursement under the program to a "sponsor," and defines sponsor as that term is defined in regulations promulgated for the Retiree Drug Subsidy (RDS) Program at 42 CFR 423.882. That definition defines sponsor as a plan sponsor as defined in section 3(16)(B) of ERISA, 29 U.S.C. 1002(16)(B), except that, in the case of a plan maintained jointly by one employer and an employee organization and for which the employer is the primary source of financing, the term means the employer. By defining the term sponsor in the regulation, and by specifying that sponsors are the entities that apply for and get reimbursed under the program, we believe we are achieving two important objectives: (1) We are ensuring that program reimbursements can be made to actual existing entities, and (2) We are promoting consistency with the RDS Program. This second objective is critical, as we believe that many of the entities that will apply for the Early Retiree Reinsurance Program are entities that participate in the RDS Program, as these two programs have many similarities. Thus, the common use of terms across the two programs will minimize confusion, and we believe will help to maximize program participation.

Although we drafted the regulation to specify that a sponsor is the entity that would be directly paid under the program, there is still a need to use the term "employment-based plan" in the regulation. This is because the statute envisions that the entity receiving reimbursement have a benefits arrangement (that is, a plan) in place that satisfies certain criteria (for example, implements programs and procedures to generate cost-savings with respect to participants with chronic and high-cost conditions.) The statute provides a definition of "employment-based plan" as constituting a "group benefits plan" that has certain characteristics. Those characteristics (for example, must be maintained by one or more employers, can include a multiemployer plan as defined in section 3(37) of ERISA) borrow components of the ERISA definition of a "group health plan". For that reason, we define "employment-based plan" as meaning a "group health plan" as defined in the RDS regulations at 42 CFR 423.882 that provides health benefits to early retirees, but excludes Federal governmental plans. (Unlike the RDS statutory provisions, the Early Retiree Reinsurance Program's statutory provisions do not expressly include Federal plans). The RDS regulatory definition of "group health plan" largely tracks the ERISA definition. For reasons previously stated, we believe it is beneficial to use the same or similar terminology, and have the same or similar requirements for the RDS Program and the Early Retiree Reinsurance Program, when appropriate. Because the RDS program requires a sponsor to have a benefits arrangement that constitutes a group health plan, we believe the benefits arrangement must be in place for purposes of the Early Retiree Reinsurance Program (that is, an employment-based plan), should also be a group health plan (that is, an employment-based plan, defined generally as group health plan). Generally, the regulation uses the term "sponsor" when referring to the entity that applies for and receives reimbursement under the program, and uses the term "employment-based plan" when discussing the health benefits arrangement the sponsor must offer.

In addition to introducing the definition of "sponsor", the regulation also defines other terms that are not defined in the statute, including the term "authorized representative." We define this term to mean an individual with legal authority to sign and bind a sponsor to the terms of a contract or agreement. This term is important in the regulatory provision relating to the program application and the plan sponsor agreement. The regulation requires an authorized representative to sign a plan sponsor agreement as part of the program application.

We use the term "benefit option" in the regulation when discussing the fact that there is only one cost threshold and cost limit per early retiree per plan, regardless of how many benefit options within that plan the early retiree is enrolled in, in a given plan year. We define "benefit option" as a particular benefit design, category of benefits, or cost-sharing arrangement offered within an employment-based plan.

The statute at section 1102(b) requires that an employment-based plan be certified by the Secretary, and submit an application for the program, before the plan can participate in the program. As stated above, under this regulation, the entity that participates in (that is, applies for) the program, is the plan sponsor. We will not approve an application unless the sponsor, and the employment-based plan, meet their respective requirements under the statute and the regulation. Therefore, we define the term "certified" as meaning that the sponsor and its employment-

based plan or plans meet the requirements of this part and the sponsor's application to participate in the program has been approved by the Secretary. All elements of this requirement must be satisfied before a sponsor can participate in the program.

The statute at section 1102(b)(2) requires employment-based plans to have programs and procedures in place to generate cost savings for participants with chronic and high-cost conditions. We define the term "chronic and high-cost condition" to mean a condition for which $15,000 or more in health benefit claims are likely to be incurred during a plan year by any one participant. Sponsors participating in this program are likely to be sponsors that have offered the applicable plan in previous years. Sponsors, therefore, will recognize which conditions are likely to result in $15,000 in claims in a plan year for one participant. While we expect that the employment-based plans will have programs and procedures in place that have generated or have the potential to generate savings for participants with these conditions, which may vary across plans, geographic regions and due to other factors, we do not expect plans to have programs and procedures in place for all conditions for which claims are likely to exceed $15,000 in a plan year for a plan participant. To require that plans have programs and procedures in place to address all chronic and high-cost conditions could exclude many sponsors from participating in the program and could be overly restrictive. We expect sponsors to take a reasonable approach when identifying such conditions and selecting programs and procedures to lower the cost of care, as well as improve the quality of care, for such conditions.

We define "claim" or "medical claim" in order to lay out in more detail what is required on the claim to be reimbursed under this program, and to note that the terms "claim" or "medical claim" include medical, surgical, hospital, prescription drug and other types of claims as determined by the Secretary. The statute at section 1102(a)(2)(A) defines "health benefits" as medical, surgical, hospital, prescription drug, and such other benefits as shall be determined by the Secretary whether self-funded, or delivered through the purchase of insurance or otherwise. The regulatory definition of "health benefit" clarifies that such benefits include benefits for the diagnosis, cure, mitigation, or prevention of physical or mental disease or condition with respect to any structure or function of the body. (As discussed below, health benefits do not include benefits specified at 45 CFR 146.145(c)(2) through (4)). Therefore, per the Secretary's authority to determine benefits for which claims may be submitted, the terms "claim" or "medical claim" include claims for the benefits set out in the definition of "health benefit." This list of benefits, for which the Secretary has the authority to determine are appropriate under the program, is not exhaustive.

The statute at section 1102(a)(2)(C) defines "early retirees" as individuals who are age 55 and older but are not eligible for coverage under Medicare, and who are not active employees of an employer maintaining, or currently contributing to, the employment-based plan or of any employer that has made substantial contributions to fund such plan. We have incorporated this definition into the regulation, and we clarified that spouses, surviving spouses, and dependents are also included in the definition of early retiree. This definition accommodates the language in section 1102(a)(1) of the statute, which states that reimbursement under the program is made to cover a portion of the costs of providing health coverage to early retirees and to the eligible spouses, surviving spouses, and dependents of such retirees. This definition accommodates the language in section 1102(a)(1) in such a way that reimbursement can be made under the program for the health benefit costs of eligible spouses, surviving spouses, and dependents of such retirees, even if they are under the age of 55, and/or are eligible for Medicare. We believe the statute can reasonably be interpreted to provide reimbursement for the health benefit costs of such individuals. This interpretation will provide additional assistance to sponsors, which will encourage them to continue to offer coverage to the spouses, surviving spouses, and dependents of early retirees.

The regulatory definition of early retiree also clarifies that the determination of whether an individual is not an active employee is made by the sponsor in accordance with the rules of its plan. However, an individual is presumed to be an active employee if, under the Medicare Secondary Payer (MSP) rules in 42 CFR 411.104 and related Centers for Medicare & Medicaid Services' (CMS) guidance, the person is considered to be receiving coverage by reason of current employment status. The presumption would apply whether or not the MSP rules actually apply to the sponsor. We also clarify that a sponsor may treat a person receiving coverage under its employment-based plan as a dependent in accordance with the rules of its plan, regardless of whether that person constitutes a dependent for Federal or state tax purposes. These two clarifications are also found in the RDS regulation in the definition of "qualifying covered retiree," under which, as that term implies, an individual must be a retiree. As previously stated, we believe that regulatory terminology and concepts should be the same or similar between the RDS Program and the Early Retiree Reinsurance Program when appropriate, and we believe it is appropriate when determining whether an individual is a retiree under each program. Finally, in the regulatory definition of "early retiree," we also clarify that for purposes of this definition, the phrase "an employer maintaining or currently contributing to the employment-based plan or any employer that has made substantial contributions to fund such plan," which is also found in the statutory definition of "early retiree," means a plan sponsor. Under ERISA (and the RDS Program regulation), a plan sponsor is an entity (such as an employer) that establishes or maintains a group health plan. Thus, because this part of the statutory definition of early retiree in the Affordable Care Act speaks to the relationship between the sponsor (for example, the employer) and the employment-based plan, we believe this clarification is appropriate.

Section 149.610 of this regulation permits the Secretary to reopen and revise a reimbursement determination upon the Secretary's own motion or upon the request of a sponsor within 1 year of the reimbursement determination for any reason, within 4 years of the reimbursement determination for good cause, or at any time in instances of fraud or similar fault. These three standards are the same regulatory standards that apply with respect to CMS' ability to reopen or revise an initial or reconsidered determination under the RDS Program, at 42 CFR 423.890(d). The RDS regulatory provision provides examples of what constitutes "good cause," and again, because of the similarity between that program and the Early Retiree Reinsurance Program, we believe those examples would be appropriate for the latter. Therefore, similar to the RDS regulation, this regulation provides the following examples of good cause: (1) New and material evidence exists that was not readily available at the time the reimbursement determination was made, (2) A clerical error in the computation of the reimbursement determination was made, or (3) The

evidence that was considered in making the reimbursement determination clearly shows on its face that an error was made. For example, if a sponsor receives a post-point-of-sale price concession that was not known at the time a reimbursement determination was made, good cause may be found and the reimbursement determination may be reopened and revised.

The statute at section 1102(a)(2)(A) defines "health benefits" as medical, surgical, hospital, prescription drug, and such other benefits as shall be determined by the Secretary, whether self-funded, or delivered through the purchase of insurance or otherwise. We clarify in the regulatory definition that such benefits include benefits for the diagnosis, cure, mitigation, or prevention of physical or mental disease or condition with respect to any structure or function of the body. This is not an exhaustive list. We also specify that health benefits do not include certain benefits designated as excepted benefits under the regulations implementing the health insurance portability provisions of the Health Insurance Portability and Accountability Act (HIPAA). Those provisions impose certain requirements on group health plans and group health insurance issuers, but do not apply those requirements to certain arrangements that typically are not part of a major medical plan (that is, excepted benefits). For example, long-term care benefits are excepted benefits. In the context of the Early Retiree Reinsurance Program, we do not believe it would be appropriate to consider health benefits as including benefits provided under such arrangements, as we believe the best read of the statutory phrase "medical, surgical, hospital, [and] prescription drug" means such major medical benefits.

In order to aid stakeholders in understanding when the Secretary will make reimbursement to a sponsor, we define the term "incurred" to mean the point in time when the sponsor, health insurance issuer, group health plan or plan participant, or a combination of these or similar stakeholders, become responsible for payment of the claim. In short, the Secretary will not pay a sponsor until a claim has been incurred and paid, as the statute at section 1102(c)(1)(B) specifies that claims "shall be based on the actual amount expended."

We define a "negotiated price concession" as any direct or indirect remuneration that would serve to decrease the costs incurred under the employment-based plan. We set out examples of what negotiated price concessions are, which include discounts, rebates, coupons, and goods in kind. The list at § 149.2, "Definitions," describing what may constitute a negotiated price concession is not an exhaustive list.

Because the statute does not use the terms "early retiree" and "plan participant" interchangeably, we define the term "plan participant" to include all enrollees in a plan, including an early and other retiree, an early and other retiree's spouse, surviving spouse, and dependent, and an active employee and an active employee's spouse and dependent.

The statute at section 1102(c)(1)(B) specifies that claims submitted under the program "shall be based on the actual amount expended by the participating employment-based plan involved within the plan year" for the health benefits provided to early retirees and eligible spouses, surviving spouses, and dependents. This regulation includes a definition of plan year, and defines plan year as the year that is designated as the plan year in the plan document of an employment-based plan, except that if the plan document does not designate a plan year, if the plan year is not a 12-month plan year, or if there is no plan document, the plan year is: (1) The deductible or limit year used under the plan, (2) the policy year, if the plan does not impose deductibles or limits on a 12-month basis: (3) the sponsor's taxable year, if the plan does not impose deductibles or limits on a 12-month basis, and either the plan is not insured or the insurance policy is not renewed on a 12-month basis, or (4) the calendar year, in any other case. We define this term in such a way to give deference to the plan year the sponsor has already established for other purposes. However, we balance that deference with our belief that the intent of the statute is to calculate reimbursement amounts, and to apply the cost threshold and cost limit, to periods of time that are 12 months in duration. We believe most sponsors' plan years are in fact 12 months in duration.

The term "post point-of-sale negotiated price concession" is defined because not all negotiated price concessions occur at or before the point of sale. The statute requires negotiated price concessions to be excluded from the calculation of reimbursement, which causes reimbursement to be based on the actual amounts paid, not an inflated amount that may not reflect a price concession. When post point-of-sale negotiated price concessions occur they may cause data submitted for reimbursement to become inaccurate, resulting in ultimately, an inaccurate reimbursement. Once these price concessions are accounted for, a sponsor's reimbursement determination may be reopened and revised.

For purposes of brevity, we defined the term "program" to mean the Early Retiree Reinsurance Program.

We define the term "Secretary" to mean the Secretary of the Department of Health & Human Services or the Secretary's designee. We include the Secretary's designee in the definition because the Secretary will not actually be performing the tasks set out in this regulation, but will designate an individual or entity to act on the Secretary's behalf.

The term "sponsor agreement" is based on the definition of the term in the RDS regulation. The sponsor agreement is basically used to ensure that the sponsor and Department are bound to comply with the details of the program that appear in the regulation and in other guidance, and to address any other points that must be addressed in order to implement this program.

B. Requirements for Eligible Employment-Based Plans (Subpart B)

1. General Requirement (§ 149.30)

In this section, we provide the requirements that allow a sponsor to be eligible to participate in the Early Retiree Reinsurance Program.

2. Requirements to Participate (§ 149.35)

Section 1102(b)(2)(A) of the Affordable Care Act requires that an employment-based plan implement programs and procedures to generate cost-savings with respect to participants with chronic and high-cost conditions. We interpret this to mean that a plan must have in place programs and procedures that have generated or have the potential to generate cost-savings for these participants in order to participate in the Early Retiree Reinsurance Program, not necessarily that the sponsor has to ensure that new programs and procedures are put in place just to participate in this program.

Proper management and treatment of chronic and high-cost conditions may be promoted by generating cost-savings for plan participants with these conditions because plan participants may be more apt to seek out proper and timely treatment and management before a condition becomes critical if treatment and management are financially manageable. As an example of a program and procedure to generate cost savings for a participant with a chronic condition, a sponsor may determine that diabetes, if not managed

properly, is likely to lead to claims in excess of $15,000 for a plan year for one plan participant. The sponsor may ensure implementation of a diabetes management program that includes aggressive monitoring and behavioral counseling to prevent complications and unnecessary hospitalization. With respect to generating cost savings for a high-cost condition, a sponsor may determine that cancer is a high-cost condition for which it should generate cost savings. The sponsor may ensure that its plan covers all or a large portion of the participant's coinsurances or copayments, and/or it could eliminate or reduce the plan's deductible for treatment and visits related to the condition. Sponsors may choose other chronic and high-cost conditions to address, but upon audit the sponsor must be able to demonstrate that its programs and procedures have generated or had the potential to generate cost savings, consistent with the representations the sponsor made in its program application.

We considered various options of how best to implement this provision and developed several options. The first option was to further identify which specific conditions meet the chronic condition definition and which specific conditions meet the high-cost condition definition and identify these specific conditions in sub-regulatory guidance to be issued at the time of, or immediately after, the issuance of this regulation. Issues that arose with this option consisted of:

(1) How best to define the terms "chronic and high-cost conditions", which would likely involve a significant amount of data analysis. Chronic and high-cost conditions can vary significantly across geographic regions, age ranges, and due to other factors. We do not think that specifying the chronic and high-cost conditions to be addressed could effectively occur within the 90 days allowed for establishment of this program; and

(2) Our belief that the Congress intends this to be an inclusive program, not a program that excludes potential sponsors merely because they did not develop programs to address the specific conditions we might identify in our guidance. Had the Congress narrowly defined the types of plans for which sponsors might be reimbursed, we might have thought that this program is not an inclusive program. Instead Congress defined the term "employment-based plan" broadly in the statute at section 1102 (a)(2)(B). It defines the term as a "group benefits plan providing health benefits" as a plan that "is * * * maintained by one or more current or former employers (including without limitation any State or local government or political subdivision thereof), employee organization, a voluntary employees' beneficiary association, or a committee or board of individuals appointed to administer such plan; or * * * a multiemployer plan * * * " Therefore the scope of sponsors eligible to receive this reimbursement is extremely broad, which shows intent on behalf of Congress to be inclusive.

The inclusive nature of the program is particularly important because this program will involve plans with plan years that began before the effective date of the program, as will be discussed below. This means that a plan may not have a program in place to address certain chronic and high-cost conditions that we may have identified after the plan year has started, which would then exclude the sponsor from participation in the program. In such cases, sponsors would, in effect, be penalized if we identified specific conditions. As stated above, chronic and high-cost conditions can vary significantly across geographic regions, age ranges, and due to other factors, so we expect that sponsors might focus cost-saving programs and procedures on conditions that effect enrollees in their plan or plans. Our intent is that the regulation takes into account these differences.

The approach we decided to take was to define the term "chronic and high-cost condition" as specified in § 149.2—Definitions. "Chronic and high-cost condition" means a condition for which $15,000 or more in applicable claims are likely to be incurred during a plan year by one participant. Therefore, a sponsor must have programs and procedures in place that generate or have the potential to generate cost savings for plan participants with conditions that are likely to generate $15,000 in claims for a plan year, in order to participate in this program. We do not require that a sponsor have programs and procedures in place to address all conditions that may result in claims exceeding $15,000 for one participant in a plan year. The sponsor must take a reasonable approach to identifying which conditions it must address. We believe this is a reasonable interpretation of the statute because it will promote cost savings for participants with chronic and high-cost conditions, but due to the approaches' flexibility (that is, the fact that sponsors may choose programs and procedures that meet this requirement that are applicable to their enrollees) will serve to allow as many of the types of sponsors referenced in the definition of "employment-based plan" as possible to become certified to participate in the program. Of course, this requirement does not supersede requirements in other Federal laws that may apply to programs and procedures for chronic and high-cost conditions, such as the Americans with Disabilities Act.

In order to administer this program and to audit the program as required by section 1102(d), we are requiring the sponsor to make records available for these purposes. For example, when a sponsor is audited, the auditors may request a copy of the sponsor's (or the sponsor's health insurance issuer or group health plan's, as applicable) policies and procedures to detect fraud, waste and abuse, and data to substantiate the effectiveness of the policies and procedures. Under this provision, the sponsor is required to ensure that the applicable policies and procedures are produced.

We also require that the sponsor have a written agreement with its health insurance issuer (as defined in 45 CFR 160.103) or employment-based plan (as defined in 45 CFR 149.2), as applicable, requiring the health insurance issuer or employment-based plan to disclose information on behalf of the sponsor to the Secretary. This requirement in part exists to accommodate the HIPAA Privacy Rule at 45 CFR part 160 and subparts A and E of part 164 ("Privacy Rule"). This rule applies to "covered entities," which include group health plans (that is, employment-based plans) and health insurance issuers, as defined in 45 CFR 160.103. Third party administrators would be business associates, as defined in 45 CFR 160.103, of group health plans. Sponsors would not become covered entities by sponsoring a plan. Sponsors typically do not perform administrative activities for their group health plans and therefore do not have access to the claims information or similar protected health information (PHI) we require in this regulation to support program reimbursement. Much of the data that we would need to support program reimbursements, as outlined above, would be PHI held by group health plans, health insurance issuers, or third party administrators on behalf of group health plans. The requirement for health insurance issuers and employment-based plans to disclose information to the Secretary encompasses information created or held by Business Associates on behalf of the health insurance issuer or group health plan.

We believe that we have the authority to require the disclosure of the PHI in accordance with section 1102(c)(1)(A), which states that a participating plan "shall submit claims for reimbursement

to the Secretary which shall contain documentation of the actual costs of the items and services for which each claim is being submitted." Additionally, section 1102(d) requires the Secretary to conduct audits of claims data submitted by, or on behalf of, sponsors participating in the program, to ensure that such plans are in compliance with the statute, and this simply cannot be done without mandating disclosure of PHI. Thus, covered entities can comply with the mandate (without first obtaining specific authorization from individuals) pursuant to "the required by law" provisions of the Privacy Rule (45 CFR 164.512(a)).

As noted above, typically group health plans and health insurance issuers or third party administrators acting on behalf of group health plans, have PHI that the Secretary requires for the submission of claims data for reimbursement under the program pursuant to the regulations. In these situations, it may be unlawful, under the Privacy Rule, for PHI to be shared with the sponsors. This regulation does not authorize disclosure of PHI to sponsors. Therefore, for purposes of this subpart, the sponsor must have a written agreement with the group health plan (that is, the employment-based plan) or health insurance issuer, as applicable, regarding disclosure of records, and the plan or issuer must disclose to us, on the sponsor's behalf, the information, data, documents, and records necessary for the sponsor to comply with this program, part, and guidance, at a time and in a manner specified by the Secretary. Sponsors of self-funded plans with legal access to such data will be able to either provide this data to us themselves or have a group health plan or insurer provide the data to us on their behalf.

Section 1102 (c)(6) of the Affordable Care Act requires the Secretary to establish procedures to protect against fraud, waste and abuse. In order to implement this provision, the Secretary will, for example, check the exclusions lists developed by the HHS' Office of the Inspector General and the U.S. General Services Administration before allowing an entity to participate, or play a role, in the program, and will take other steps such as verifying the identities of the early retirees for whom claims are being submitted. The Secretary may also verify the identities of the individuals associated with the sponsor and health insurance issuer, or group health plan, as applicable, and will examine claims before reimbursement is made, to ensure, among other things, that instances of fraud, waste and abuse are minimized. Furthermore, the Secretary will perform audits per section 1102(d) of the Affordable Care Act. To aid the Secretary in detecting and reducing fraud, waste and abuse, we are requiring that sponsors ensure that there are policies and procedures in place to detect and reduce fraud, waste and abuse. While the policies and procedures may be maintained by the sponsor's health insurance issuer or group health plan, the sponsor will have to attest that these policies and procedures are in place in the application. The sponsor must comply with requests from the Secretary to produce the policies and procedures and any documents or data to substantiate the implementation, and the effectiveness, of the procedures. We believe we meet the requirements of the statute by taking actions to detect and reduce fraud, waste, and abuse, by requiring sponsors to have such policies and procedures in place, and by requiring a sponsor to produce the policies and procedures upon request (such as for the purposes of an audit). If it is found that a sponsor committed fraud, waste or abuse, or allowed fraud, waste, and abuse to occur under its plan or plans, the Secretary may recoup from the sponsor some or all of the reimbursements paid under the program, and/or may revoke a sponsor's certification to participate in the program. Of course, there are other laws relating to fraud, waste, and abuse, with which sponsors and their health insurance issuers or group health plans must comply.

3. Application (§ 149.40)

Section 1102(b)(1)(B) requires the sponsor to submit "an application for participation in the program, at such time, in such manner, and containing such information as the Secretary shall require." In order to implement this provision, a sponsor must submit one application per plan, and identify the plan year cycle for which the sponsor is applying (that is, starting month and day, and ending month and day; no year is required). One application must be filed for each plan. Filing a different application for each plan will aid in tracking the plan as this program progresses to ensure proper reimbursement and compliance with program requirements.

In order to verify the accuracy of the information contained in the application, the application will have to be signed by an authorized representative of the applicant and the authorized representative will have to certify that the information contained in the application is true and accurate to the best of the authorized representative's knowledge and belief, among other certifications. We use the term applicant in this section to refer to any sponsor that has filed an application that has not yet been certified under the program. The term applicant is used to clarify that the applicant is not entitled to the privileges of a certified sponsor, such as the ability to submit a reimbursement request or appeal a reimbursement determination. Before a sponsor may submit claims and make a reimbursement request, the sponsor's application must be approved by the Secretary. Applications will be processed in the order in which they are received. Because funding for this program is limited, we expect more requests for reimbursement than there are funds to pay the requests. Therefore we expect an applicant to perform its due diligence when applying, which should result in the submission of a complete application upon the first submission. Because it is important that applicants submit complete applications the first time, we will be providing assistance. If an application is incomplete, it will be denied and the applicant will have to submit a new application, which will be processed based on when the new application is received. If we were to allow an applicant to cure defects in the application, it would likely result in an extended application process, which would hinder the efficient implementation of this program. We must be prepared to exercise our authority under section 1102(f) to stop accepting applications based on the availability of the $5 billion appropriated for the program. It is therefore of paramount importance to applicants that they submit complete applications upon their first submission, otherwise there may not be an opportunity to submit a new and complete application.

An application for a given plan does not have to be submitted each year. To require a separate application for a plan each year would only complicate the process and would place unneeded burden on applicants and the Secretary. The application will request the plan year cycles (that is, the start month and day and the end month and day; no year required), which for our purposes will provide the information we need to calculate reimbursement based on reimbursement requests. We do not think that an annual application approval is required. Once a plan is certified, the application approved, and the sponsor continues to meet the requirements of the statute, this part,

and applicable guidance, the plan and sponsor will continue to be certified and the application approved.

We set out in § 149.40 what we believe we will need in order to approve an application. The application must include the applicant's Tax Identification Number, the applicant's name and address, and contact information for the applicant. To ensure compliance with the requirements of the statute, an applicant must provide a summary in its application of how it will use the reimbursement to meet the requirements of the program, including how it will use the reimbursement to reduce plan participant or sponsor costs, or any combination of these costs, and its plans to implement programs and procedures to generate savings for plan participants with chronic and high-cost conditions. Because the statute requires that the funds dispersed under this program not be used as general revenue, we are requiring sponsors to maintain the level of effort in contributing to support their applicable plan or plans. Otherwise, sponsors might circumvent the prohibition on using the program funds as general revenue by using, dollar for dollar, sponsors' funds not otherwise used for health benefits due to the program reimbursement, as general revenue. We expect that sponsors will use the reimbursement to pay for increases in, for example, the sponsor's premium, or increases in other health benefit costs (or to reduce plan participants' costs). Therefore the sponsor's summary of how it will use the program's reimbursement must also explain how the reimbursement will be applied to maintain the sponsor's level of effort in contributing to support the applicable plan. We do not expect a sponsor to explain every detail of their programs and procedures and use of program funds but to give us an idea of how it will meet these requirements. We understand that these submissions may vary because applicants' situations with respect to their plans may vary widely. For example, reimbursements received in the first year that a sponsor participates may be applied the second year of participation because many plans will have already been negotiated, agreed to, and implemented upon the effective date of this regulation. Other sponsors may have more flexibility to use these reimbursements immediately to lower costs.

We will also require applicants to project their reimbursement amounts for the first two plan-year cycles in the application so that we can project total reimbursement amounts. To help us with our funding projections, we will need sponsors to identify specific projected reimbursement amounts for each of the two plan-year cycles. This assessment will help us determine if and when we should stop accepting applications due to funding limitations. We will also require applicants to identify all benefit options under the employment-based plan that any early retiree, for whom the applicant may receive program reimbursement, may be claimed. This is necessary for us to track where funds are being spent and to otherwise manage the program. We will also require sponsors to attest that there are fraud, waste and abuse policies and procedures in place.

As is required in the RDS program, as a condition of participation, the sponsor will be required to sign a plan sponsor agreement, which will include certain assurances made by the sponsor. Included in this agreement will be a provision stating that reimbursement is based on information and data submitted by the sponsor and if the information and data are found to be inaccurate, incomplete or otherwise incorrect, the Secretary may reopen and revise a reimbursement determination, including recouping reimbursement from the sponsor. The sponsor will be required to specifically agree to comply with the terms and conditions for participation in the program, and acknowledge that information in the application is being provided for the purpose of obtaining federal funds. This list of application requirements is not exhaustive. Due to the compressed timeline for implementing this program, we may need to request additional information in the application.

Finally, we allow the Secretary to reopen a determination under which an application had been approved or denied so that if it is later determined that a sponsor committed fraud or otherwise was untruthful in the application, the Secretary can revisit the determination.

4. Consequences of Non-Compliance, Fraud or Similar Fault (§ 149.41)

To clarify the actions the Secretary may take in instances when non-compliance, fraud, waste, and abuse, or similar fault are found, we include a regulation that states that failure to comply with the requirements of this part, or if fraud, waste, and abuse, or similar fault are found, the Secretary may recoup or withhold funds, terminate or deny an application, or take any combination of these actions. We include termination of an application because, depending upon the specific situation involved, if it is found that a sponsor committed fraud or otherwise was untruthful in the application, the determination to approve an application can be revised under § 149.40. We believe it is important to set out what actions the Secretary may take so that sponsors are aware of the ramifications of non-compliance, fraud, waste and abuse, or similar fault. This regulation does not, of course, supersede other Federal laws or consequences of non-compliance fraud, waste and abuse, or similar fault.

5. Funding Limitation (§ 149.45)

Section 1102(f) authorizes the Secretary to stop accepting applications based on the availability of funds. We clarify that a reimbursement request made on behalf of a certified plan may also be denied, in whole or in part, due to limitation of funds. Determinations based on funding limitations are final, binding and cannot be appealed, because any appeal, even if a sponsor is successful, would not result in reimbursement to a sponsor. Once the program funds are exhausted there will be no funds to reimburse a sponsor that may have been successful upon appeal.

C. Reinsurance Amounts (Subpart C)

1. Amount of Reimbursement (§ 149.100)

The statute at section 1102(c) requires the Secretary, upon receipt of a valid claim for health benefits, to make reimbursement in an amount of 80 percent of the portion of the health benefit costs (net of negotiated price concessions) attributable to the claims that exceed $15,000, but are below $90,000. We interpret the statute to mean that cumulative health benefits incurred in a given plan year and paid for a given early retiree, as defined in § 149.2, that fall between those amounts will receive reimbursement, rather than reimbursement being made only for discrete health benefit items or services whose reimbursement total falls between those amounts. This interpretation will get much needed program funds to plan sponsors more quickly. The statute also specifies that in determining the amount of claims, the costs paid by the early retiree (or his or her spouse, surviving spouse, or dependent) in the form of deductibles, copayments, or coinsurance shall be included in the amounts paid by the participating employment-based plan. As an initial matter, we clarify in the regulation that reimbursement will be made under the program only for claims that are incurred during the applicable plan year, and paid.

The regulation refers to the $15,000 lower limit and the $90,000 ceiling as

the "cost threshold" and "cost limit", respectively, and indicates that reimbursement under the program is calculated by first determining the costs for health benefits net of negotiated price concessions, within the applicable plan year for each early retiree, and then subtracting amounts below the cost threshold and above the cost limit within the applicable plan year for each early retiree. We also clarify that for purposes of determining the amounts below the cost threshold and above the cost limit for any given early retiree, all costs for health benefits paid by the plan or by the early retiree for all benefit options the early retiree is enrolled in with respect to a given certified employment-based plan for a given plan year, will be combined. We make this clarification because the statute, at section 1102(c)(3), specifies that "a claim submitted by a participating employment-based plan shall not be less than $15,000 nor greater than $90,000" (emphasis added). For example, an early retiree is simultaneously enrolled in two different benefit options within one group health plan—Option 1 as a retiree, and Option 2 as a spouse of a retiree. For purposes of determining when the early retiree satisfies the cost threshold, all claims incurred and paid for that early retiree by both benefit options within the applicable plan year, will be counted. The claims for that early retiree under each benefit option will not be separately counted. For purposes of determining if and when the early enrollee has satisfied the cost limit, the same principle applies. In other words, within one employment-based plan for a given plan year, there is one threshold limit, and one cost limit, per early retiree.

We also indicate that the reimbursement formula specified in the regulation applies to insured plans as well as self-funded plans, and that with respect to insured plans, costs for health benefits means costs the insurer and the early retiree pay for health benefits net of negotiated price concessions the insurer receives for health benefits. Thus, for insured plans, the amount of premium the sponsor pays (and the amount of premium contribution the early retiree pays) is irrelevant for purposes of calculating reimbursement under the program. We believe this is the correct interpretation because section 1102(c)(1)(A) states that claims for reimbursement must "contain documentation of actual costs of items and services * * *." Premiums are not costs for items and services.

2. Transition (§ 149.105)

The program becomes effective June 1, 2010. We carefully considered whether to allow sponsors to participate in the program for plan years that ended before the program's effective date, but decided that such an approach would seem inconsistent with the program's effective date. We also considered whether to permit sponsors to participate only for plan years that start on or after the program's effective date, but decided that such an approach would arbitrarily favor sponsors with plan years that start soon after June 1, 2010. Therefore, we decided to allow sponsors to apply for plan years that start before June 1, 2010, provided they end after that date (for example, calendar year 2010 plans).[1] This raised the question of how claims incurred during such a plan year, but before June 1, 2010, would be dealt with under the program. Under one approach considered, any such claims would count toward the cost threshold, and any such claims exceeding the threshold, but below the cost limit, would be eligible for program reimbursement. We did not adopt that approach, as it arguably would unfairly favor sponsors with plan years that started significantly before the program's effective date, especially in light of the program's limited funding.

We decided upon the following approach. For claims incurred before June 1, 2010, the amount of such claims up to $15,000 count toward the cost threshold and the cost limit. The amount of claims incurred before June 1, 2010 that exceed $15,000 are not eligible for reimbursement and do not count toward the cost limit. The reinsurance amount to be paid is based solely on claims incurred on and after June 1, 2010, and that fall between the cost threshold and cost limit for the plan year. As an example, for a plan with a plan year that began July 1, 2009, with an end date of June 30, 2010, with an early retiree for which it has spent $120,000 in health benefit claims before June 1, 2010, and it then spends another $30,000 in health benefit claims on the early retiree between June 1, 2010 and June 30, 2010, the sponsor would receive credit for $15,000 in claims incurred before June 1 and receive reimbursement of 80 percent of the $30,000 (for the claims incurred after June 1, 2010), or $24,000. We believe this is a reasonable approach because it provides as much relief as possible as soon as possible to sponsors, while giving meaning to the effective date of the program. A sponsor should therefore not submit claims above the $15,000 cost threshold that were incurred before June 1, 2010, for reimbursement, as submission of such claims is outside the scope of the regulation. Also, to submit these claims for reimbursement will make the reimbursement process more complex than it needs to be.

3. Negotiated Price Concessions (§ 149.110) and Cost Threshold and Cost Limit (§ 149.115)

Section 1102(c)(1)(B) states that any negotiated price concessions obtained by an employment-based plan with respect to a health benefit must be reflected in claims submitted for program reimbursement. We recognize that sponsors and insurers sometimes do not receive certain negotiated price concessions until after payment is made, and in many cases, after the plan year during which the claim is incurred and paid, has ended. For example, this is typically the case with prescription drug rebates. Thus, we specify in the regulation that sponsors must disclose such "post-point-of-sale" negotiated price concessions, in a form and manner to be specified by the Secretary. We expect to specify the form and manner of such disclosures in future guidance. This will ensure that sponsors ultimately submit accurate claims data, and thus ultimately receive accurate reimbursement.

Finally, the statute indicates that the $15,000 and $90,000 figures shall be adjusted each fiscal year based on the percentage increase in the Medical Care Component of the Consumer Price Index for all urban consumers (rounded to the nearest multiple of $1,000) for the year involved. We specify in the regulations that for plan years starting on or after October 1, 2011, the figures will be so adjusted.

D. Use of Reimbursements (Subpart D)

Use of Reimbursements (§ 149.200)

Section 1102(c)(4) requires that the reimbursement "shall be used to lower costs for the plan. Such payments may be used to reduce premium costs for an entity" receiving a reimbursement or to reduce premium contributions, co-payments, deductibles, co-insurance, or other out-of-pocket costs for plan participants. We encourage sponsors to use their reimbursement under the program for both of the following purposes: (1) To reduce the sponsor's health benefit premiums or health benefit costs, and (2) To reduce health benefit premium contributions, co-payments, deductibles, coinsurance, or

[1] Sponsors can also apply for plan years that start after June 1, 2010.

other out-of-pocket costs, or any combination of these costs, for plan participants. We expect that sponsors will continue to provide at least the same level of contribution to support the applicable plan, as it did before this program. For example, for a sponsor that pays a premium to an insurer, if the premium increases, program funds may be used to pay the sponsor's share of the premium increase from year to year, which reduces the sponsor's premium costs. Section 1102(c)(4) sets forth the requirements for use of reimbursements under this section and envisions a role for the Secretary in developing a mechanism to monitor the appropriate use of such reimbursements. Additional information about this mechanism will be disseminated as it is developed.

The statute does not appear to use the terms "early retiree" and "plan participants" interchangeably. Therefore, we interpret this provision to mean that a sponsor may only receive program funds for claims of early retirees or their spouses, surviving spouses or dependents, but the funds may be used to lower health benefit costs for all participants in the plan, including retirees, and their spouses and dependents, and active employees and their spouses and dependents. At § 149.200 (b), we clarify the statutory prohibition on using the funds as general revenue of the sponsor.

E. Reimbursement Methods (Subpart E)

1. General Reimbursement Rules (§ 149.300), Timing (§ 149.310), Reimbursement Conditioned Upon Available Funds (§ 149.315), Universe of Claims That Must Be Submitted (§ 149.320), Requirements for Eligibility of Claims (§ 149.325), and Content of Claims (§ 149.330)

Section 1102(c)(1) of the Affordable Care Act states that a participating employment-based plan shall submit claims for reimbursement to the Secretary which shall contain documentation of the actual costs of the items and services for which each claim is being submitted. As noted above, we define "claim" as documentation specifying the health benefit provided, the provider or supplier, the incurred date, the individual for whom the health benefit was provided, the date and amount of payment net any known negotiated price concessions, and the employment-based plan and benefit option under which the health benefit was provided. The terms "claim" or "medical claim" include medical, surgical, hospital, prescription drug and other such claims as determined by the Secretary. We clarify in the regulation that claims for benefits for the diagnosis, cure, mitigation, or prevention of physical or mental disease or condition with respect to any structure or function of the body, may be filed. This clarification is not an exhaustive list of claims that the Secretary may determine are appropriate.

The regulation also specifies that claims cannot be submitted for a given plan year until the application that is associated with the claim and that references the applicable plan year cycle has been approved. With respect to a given early retiree, claims cannot be submitted until the early retiree's total paid costs for health benefits incurred for the plan year exceed the applicable cost threshold. Once that threshold has been reached, claims can be submitted, but they must include all claims below the applicable cost threshold for the plan year in order to verify that the cost threshold has been met. Claims must be submitted based on the amounts actually paid, which may include the amounts paid by the early retiree. Once the cumulative claims of an early retiree, as defined in § 149.2, exceed $90,000 for a plan year, a sponsor should not submit claims above this claims limit for that early retiree because no reimbursement will be paid on these claims.

2. Documentation of the Actual Cost of Medical Claims Involved (§ 149.335), Rule for Insured Plans (§ 149.340), and Use of Information Provided (§ 149.345)

All claims submissions must include a list of early retirees for whom claims are being submitted. Both the documentation of actual costs of claims and the list of early retirees must be submitted in a form and manner to be specified by the Secretary. Claims submissions will be processed on a first-in, first-out basis until program funding is expended.

We also specify that with respect to insured plans, the claims and the list of early retirees can be submitted directly to the Secretary by the insurer.

In order for a sponsor to receive credit for the cost-sharing amounts paid by the early retiree or the early retiree's spouse, surviving spouse or dependent, the sponsor must provide prima facie evidence that the early retiree or the early retiree's spouse, surviving spouse or dependent, paid his or her portion of the costs. Such evidence may include an actual payment receipt. If a sponsor cannot provide prima facie evidence, it may receive credit under the program only for the portion of the claim the sponsor actually paid.

There may be instances when a sponsor contracts with, for example, a staff-model health maintenance organization, that either has its own provider(s) on-staff or pays providers a capitated payment to care for plan participants. In these instances, claims might not ordinarily be produced. However, in order for the Secretary to calculate reimbursement under this program for such sponsors, the sponsor will be required to ensure that the insurer submit the information required in a claim as specified in § 149.330 and § 149. 335. The information submitted by the insurer must be reasonable in light of the specific market that the insurer is serving.

3. Maintenance of Records (§ 149.350)

The regulations also specify how the Secretary may use the information collected for purposes of the program, and the records maintenance requirements that apply to the sponsor. The specified records must be maintained for 6 years after the expiration of the plan year in which the costs were incurred, or longer if otherwise required by law. The sponsor must require its health insurance issuer or employment-based health plan, as applicable, to maintain and produce upon request records to satisfy the maintenance of records requirements.

F. Appeals (Subpart F)

1. Appeals (§ 149.500)

Section 1102(c)(6) of the Affordable Care Act requires the Secretary to establish an appeals process to permit sponsors to appeal a determination made by the Secretary with respect to claims submitted under the program. Due to the limited funding and temporary nature of the program, we have established a one-step appeal process. A sponsor may appeal directly to the Secretary within 15 calendar days of receipt of the determination at issue. Section 149.500 sets out what we consider to be an adverse reimbursement determination, which is a determination relating to the amount of reimbursement paid under the program.

2. Content of Request for Appeal (§ 149.510)

The request for appeal must specify the findings or issues with which the sponsor disagrees and the reasons for the disagreements. The request for appeal may include supporting documentary evidence the sponsor wishes the Secretary to consider. Essentially the sponsor must provide the Secretary with its issues and arguments and any supporting documentation that it has to support its

arguments. The Secretary may accept subsequent supporting documentation if, for example, the sponsor did not have time during the 15-day window to perform a comprehensive data analysis of the issue. It would be helpful in the request for appeal if the sponsor notes that further information will be provided to support the request for appeal and a date by which the information will be received by the Secretary.

3. Review of Appeals (§ 149.520)

The regulation sets out generally the process the Secretary will use when reviewing the appeal and clarifies that the Secretary's decision will be final and binding, unless fraud or similar fault are involved. The Secretary will not accept oral argument or oral testimony, either in person or on the telephone.

If all or part of a reimbursement request is denied based on the unavailability of funds, the sponsor may not appeal because an appeal would serve no purpose. If funds are exhausted, there will be no funds to reimburse a sponsor if it is found that the sponsor should otherwise be eligible for reimbursement. Allowing an appeal when funds are exhausted only serves to add burden to sponsors that have received an adverse determination, because, if we allow such an appeal, an aggrieved sponsor may feel that it must appeal in order to exhaust its remedies and to protect its interests. Once the funds for the program are exhausted, there is no interest for the sponsor to protect because there will be no chance of reimbursement, even upon a successful appeal. It will also serve to increase the Secretary's burden because the Secretary will have to process and respond to each of these appeals, when there would be no possibility of a reimbursement adjustment in favor of the sponsor.

The Secretary will inform the sponsor and the applicable HHS designee of the Secretary's decision. Because time is of the essence with respect to funding, we do not specify how the Secretary will inform these stakeholders of the decision because it may be in writing, via electronic means or orally. The response process will be further reviewed to ensure that stakeholders receive appropriate notice of a decision. Of course, we do specify that if the sponsor requests a written response, the Secretary will provide a written response.

G. Disclosure of Data Inaccuracies (Subpart G)

1. Sponsor's Duty To Report Data Inaccuracies (§ 149.600)

Claims submitted for reimbursement may change after the 15-day appeal-request period has expired. For example, if a provider reverses a claim after the appeal-request period has expired, data would need to be updated to reflect the reversal. However, in order to make accurate reimbursements (reopen and revise reimbursement determinations that have already been made), sponsors are required to submit accurate data for reimbursement purposes. We understand that claims may be reversed or otherwise altered and that data that was accurate when submitted for reimbursement under the program may become inaccurate. Furthermore, reimbursement under this program is based on claims that are net of negotiated price concessions. Because negotiated price concessions include post-point-of-sale price concessions, data submitted for reimbursement may become inaccurate once the price concessions are finalized for a given plan year.

We do not believe it is necessary to require a sponsor to submit a formal appeal under § 149.500 to the Secretary merely because data changes due to the natural course of business. Also, we realize that certain changes in data due to the normal course of business might not become evident to a sponsor within 15 days after a reimbursement determination. Therefore, we are establishing a process that will give sponsors the ability to update us on any data inaccuracies and will allow us to reopen and revise a reimbursement determination as necessary, based on the updated data. We believe this would be the most efficient way to administer this program, particularly because of the limited nature of the program funds and the uncertain length of time that an appeal to the Secretary may involve.

2. Secretary's Authority To Reopen and Revise Reimbursement Determination Amounts (§ 149.610)

While the details of this process will be developed in sub-regulatory guidance, we state that the Secretary may reopen and revise a reimbursement determination upon its own motion or upon the request of a sponsor, within 1 year of a reimbursement determination, for any reason, within 4 years of a reimbursement determination for good cause, or at any time in instances fraud or similar fault. We define the term "good cause" in § 149.2, and discuss in the regulation what we believe is not good cause for revising the reimbursement. This regulation tracks the language in the RDS and Part D reconciliation reopening regulations at § 423.890 and § 423.346, respectively.

We specify in this section that the Secretary may reopen and revise a reimbursement determination on the Secretary's own motion. If the Secretary becomes aware that a reimbursement determination was made based upon inaccurate data, this will allow the Secretary to reopen and revise the reimbursement determination without the sponsor having to make a request. Reimbursement determinations may be reopened and revised to pay out more funds to a sponsor assuming such funds exist or to recoup funds that were already paid, or to withhold funds from a future reimbursement to offset a sponsor's liability.

H. Change of Ownership Requirements (Subpart H)

1. Change of Ownership Requirements (§ 149.700)

We include in this regulation requirements for a sponsor to provide the Secretary with advance notice of any change of ownership of the sponsor. Complying with this requirement is critically important, as it helps to ensure that program reimbursement is being made only to legitimate entities, and only to such entities that are actually complying with the requirements of the program. The requirements mirror the change of ownership requirements that are found in the RDS regulation, which we believe are appropriate for the Early Retiree Reinsurance Program, in light of the fact that we expect many sponsors to participate in both programs. Complying with the change of ownership requirements is especially critical with respect to the Early Retiree Reinsurance Program, in light of the program's limited funding.

The regulations define a change of ownership as any of the following:

(1) The removal, addition, or substitution of a partner, unless the partners expressly agree otherwise as permitted by applicable state law.

(2) Transfer of all or substantially all of the assets of the sponsor to another party.

(3) The merger of the sponsor's corporation into another corporation or the consolidation of the sponsor's organization with one or more other corporations, resulting in a new corporate body.

Transfer of corporate stock or the merger of another corporation into the sponsor's corporation, with the sponsor

surviving, does not ordinarily constitute change of ownership.

A sponsor that has a sponsor agreement in effect and is considering or negotiating a change in ownership must notify the Secretary at least 60 days before the anticipated effective date of the change. When there is a change of ownership that results in a transfer of the liability for health benefit costs, the existing sponsor agreement is automatically assigned to the new owner. This requirement is necessary because there may be obligations under the plan sponsor agreement that do not surface until some time after the change of ownership. The Secretary must ensure that there is a party to the plan sponsor agreement that can satisfy those obligations, which may include the return of program reimbursement. The new owner to whom a sponsor agreement is assigned is subject to all applicable statutes, regulations, and guidance, and to the terms and conditions of the sponsor agreement. Failure to notify the Secretary at least 60 days before the anticipated effective date of the change may result in the Secretary recovering funds paid under the program.

III. Waiver of Proposed Rulemaking and Delay in Effective Date

A. Waiver of Notice-and-Comment Procedure

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on the proposed rule. The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substances of the proposed rule or a description of the subjects and issues involved. This procedure can be waived under section 553(b)(3)(B) of the Administrative Procedure Act, however, if an agency finds good cause that notice-and-comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued. Below, we discuss our reasons for the waiver of notice-and-comment procedure.

Section 1102(a)(1) of the Affordable Care Act requires the Secretary, not later than 90 days after enactment of the Act, to establish a temporary Early Retiree Reinsurance Program. The Affordable Care Act was enacted on March 23, 2010, which means that the Secretary must implement the Early Retiree Reinsurance Program by June 21, 2010. We believe this is insufficient time for notice-and-comment rulemaking. The 90 days Congress specified does not allow for development of the rule, a meaningful public comment period, and agency analysis of, and response to, those comments before this rule can be made final. Moreover, we need to actually establish a temporary Early Retiree Reinsurance Program—not simply issue this interim final rule—by June 1, 2010, in order to align the effective date of the program with some sponsors' plan year start dates and to simplify accounting for sponsors and the Secretary, as is discussed below. We must finalize this rule in order to take the multiple other steps necessary to establish the program. Within the time frame contemplated in the statute, we need to have regulations effective in time for applicants to be able to review them and begin to put together their information so that they can apply (once the application process is finalized). The application process cannot be finalized until the regulations are close to being finalized in this Interim Final Rule. Furthermore, the Secretary needs to have established the rules by which she is going to implement this program so that she can move forward with actually administering it, which includes contracting with a contractor to aid with administering the program. The regulations have to be close to finalized before the Secretary can draft a comprehensive scope of work for the contract that will be issued to aid the Secretary with administering this program.

Therefore, we find good cause to waive the notice of proposed rulemaking and to issue this final rule on an interim basis without prior comment. While we are not providing prior comment, we are providing a 30-day public comment period.

B. Waiver of Delay of Effective Date

In addition, section 553(d) of the APA ordinarily requires that a regulation be effective no earlier than 30 days after publication. Under section 553(d)(3) this requirement can be waived for good cause.

As explained above, Section 1102(a)(1) of the Affordable Care Act requires the Secretary to establish the Early Retiree Reinsurance Program by June 21, 2010. In order to better align the effective date of some sponsors' plan and/or fiscal years with the effective date of the program, to allow sponsors to be credited for claims starting at the beginning of a month in order to simplify accounting for sponsors and the Secretary, and to allow sponsors to be credited for claims incurred before June 21, 2010, we need to actually establish the program—not simply issue this Interim Final Rule—by June 1, 2010, as opposed to June 21, 2010. As a result, we find good cause to waive the 30-day delay in effective date that would otherwise apply under section 553(d) of the Administrative Procedure Act (APA) for this rule implementing the Early Retiree Reinsurance Program. This Interim Final Rule will become effective on June 1, 2010.

In addition, 5 U.S.C. 801 generally requires that agencies submit major rules to the Congress 60 days before the rules are scheduled to become effective. This delay does not apply, however, when there has been a finding of good cause for waiver of prior notice and comment as set forth above.

IV. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995, we are required to provide 30-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs).

A. ICRs Regarding Requirements To Participate (§ 149.35)

Section 149.35(b)(1) requires plan sponsors to make available documentation, data, and other information related to this part and any other records specified by the Secretary, as stated in § 149.350. The burden associated with this requirement is detailed in our discussion of § 149.350.

Section 149.35(b)(2) states that a plan sponsor must have a written agreement with its health insurance issuer (as defined in 45 CFR 160.103) or employment-based plan (as applicable) regarding disclosure of information, data, documents, and records to the Secretary, and the health insurance issuer or employment-based plan must

disclose to the Secretary, on behalf of the sponsor, the information necessary for the sponsor to comply with the program, this part, and program guidance. The burden associated with this requirement is the time and effort necessary for a plan sponsor to develop, sign, and maintain the aforementioned written agreement with its health insurance issuer or employment-based plan. We estimate that it will take 1 hour to develop, sign, and maintain one such written agreement. We also estimate that each plan sponsor on average will need to maintain and sign 3 such agreements. Using the RDS Program as a baseline, we estimate that 4,500 Early Retiree Reinsurance Program plan sponsors must comply with this requirement. The estimated annual burden associated with this requirement is 13,500 hours. The estimate cost of compliance with this requirement is $1,005,885, for the first year of the program. For the subsequent four years, we estimate that roughly one-quarter of the 4,500 sponsors (1,125) will contract with one different entity each year to disclose information, data, etc., to the Secretary. For each of those years, the estimated cost of compliance with this requirement is $83,824.

Section 149.35(b)(3) requires plan sponsors to have procedures to protect against fraud, waste and abuse under this program, and must comply timely with requests from the Secretary to produce the procedures and any documents or data to substantiate the implementation of the procedures and their effectiveness. Additionally, § 149.35(b)(5) requires plan sponsors to comply timely with requests from the Secretary to produce the procedures and any documents or data to substantiate the implementation of the procedures and their effectiveness. The burden associated with the requirements in § 149.35(b)(3) is the time and effort necessary to develop, implement, and maintain procedures to protect against fraud, waste and abuse under this program. There is also burden associated with producing the procedures and any supporting documentation up request by the Secretary. We estimate that it will take 20 hours for each plan sponsor or designee to develop, implement and maintain one set of such policies and procedures. We also estimate that with respect to each plan sponsor, an average of three separate sets of policies and procedures will have to be developed, implemented and maintained, to account for the fact that many sponsors will have multiple benefit options, each using a different entity that is submitting claims to the program on their behalf. However, we estimate that one-third of the 4,500 expected plan sponsors will be contracting with entities that submit claims to the program that already have fraud, waste and abuse programs and procedures in place. Therefore, we estimate that 3,000 plan sponsors will have to newly develop, implement, and maintain such program and procedures. The estimated annual burden for these requirements is 20 hours per set of fraud, waste and abuse procedures. The estimated cost associated with this requirement is $9,982,800 for the first year of the program. For the subsequent four years of the program, we estimate that roughly one quarter of the estimated 4,500 sponsors (roughly 1,125) will contract with one new entity each year, to submit claims to the program on the sponsor's behalf. For each of those years, the estimated annual burden associated with this burden is 1,125 sponsors multiplied by 20 hours, or 22,500 hours, with estimated costs equal to $1,247,850.

Section 149.35(b)(4) also requires plan sponsors to submit an application to the Secretary in the manner, and at the time, required by the Secretary, as specified in § 149.40. The burden associated with this requirement is detailed in our discussion of § 149.40.

B. ICRs Regarding Application (§ 149.40)

Section 149.40 discusses the application process for the early retiree reinsurance program. As stated in § 149.40(a) requires an applicant to submit an application to participate in this program to the Secretary, which is signed by an authorized representative of the applicant who certifies that the information contained in the application is true and accurate to the best of the authorized representative's knowledge and belief. Section 149.40(e) states that an applicant must submit an application for each plan for which it will submit a reimbursement request. Furthermore, as part of the application process, every application must be accompanied by the information listed in § 149.40(f).

The burden associated with the requirements in this section is the time and effort necessary for a plan sponsor or its designee to complete an application for each plan for which it will submit a reimbursement request. In addition, there is burden associated with compiling and submitting the required ancillary information listed in § 149.40(f). We estimate that the program will receive an average of 1 application each, from 4,500 plan sponsors or their designees. We further estimate that it will take 35 hours for a plan sponsor or designee to complete one application package. The total estimated annual burden associated with this requirement is 157,500 hours. The total estimated annual cost associated with this requirement is $8,820,675. This is a one-time burden, as sponsors are not required to submit a new application for each plan year.

C. ICRs Regarding Documentation of Actual Costs of Medical Claims Involved (§ 149.335)

Section § 149.335 requires that sponsors must submit claims, with each submission consisting of a list of early retirees for whom claims are being submitted, and documentation of the actual costs of the items and services for each claim being submitted. These material must be submitted in a form and manner specified by the Secretary. Additionally, in order for a sponsor to receive reimbursement for the portion of a claim that an early retiree paid, the sponsor must submit prima facie evidence that the early enrollee paid his or her portion of the claim. The burden associated with the requirements in this section is the time and effort necessary for sponsors to assemble and submit the aforementioned information. We estimate that it will take each sponsor an average of 45 hours to comply with these requirements, with the number of hours varying based upon the number of early retirees for whom claims are submitted, the number of claims, the technology used to generate the required information, etc. We estimate that each of the 4,500 participating sponsors will make two submissions annually. The total estimated annual burden associated with this requirement is 405,000 hours. The total estimated annual cost associated with these requirements is $15,758,550.

D. ICRs Regarding Maintenance of Records (§ 149.350)

Section 149.350(a) requires the sponsor of the certified plan (or a subcontractor, as applicable) must maintain and furnish to the Secretary, or its designee, upon request the records as specified in § 149.350(b). The records must be maintained for 6 years after the expiration of the plan year in which the costs were incurred, or longer if otherwise required by law. Similarly, as required by § 149.350(d), the sponsor must require its health insurance issuer or employment-based plan, as applicable, to maintain and produce upon request records to satisfy subparagraph (c) of this regulation. The

burden associated with the requirements in this section is the time and effort necessary to retain the specified records. We estimate that each of the estimated 4,500 sponsors will require 6 hours to retain the records. The total estimated annual burden associated with this requirement is 27,000 hours. The total estimated annual cost associated with this requirement is $1,050,570.

E. ICRs Regarding Appeals (§ 149.500 and § 149.510)

Section 149.500(d) states that if a sponsor appeals an adverse reimbursement determination, the sponsor must submit the appeal in writing to the Secretary within 15 days of receipt of the determination. Section 149.510 requires a request for appeal to specify the findings or issues with which the sponsor disagrees and the reasons for the disagreements. In addition, the request for appeal may include supporting documentary evidence the sponsor wishes the Secretary to consider. The burden associated with the aforementioned requirements is the time and effort necessary for a sponsor to draft and submit an appeal, including supporting documentation. While this requirement is subject to the PRA, we believe the associated burden is exempt under 5 CFR 1320.4. In this case, the information associated with an appeal would be collected subsequent to an administrative action, that is, an adverse reimbursement determination or an application denial.

F. ICRs Regarding Sponsor's Duty To Report Data Inaccuracies (§ 149.600)

Section 149.600 requires a sponsor to disclose any data inaccuracies on which a reimbursement request has been made, including inaccurate claims data and negotiated price concessions, in a manner and at a time specified by the Secretary in guidance. The burden associated with this requirement is the time and effort necessary for a sponsor to comply with the reporting requirement. We estimate that 1,500 sponsors annually will be subject to this requirement, and that burden associated with this requirement is 32 hours per sponsor (two disclosures per year per sponsor, each disclosure having an estimated burden of 16 hours). The estimated annual burden associated with this requirement is 48,000 hours. The total estimated annual cost associated with this burden is $1,867,680.

G. ICRs Regarding Change of Ownership Requirements (§ 149.700)

Section 149.700(c) requires a sponsor that has a sponsor agreement in effect under this part and is considering or negotiating a change in ownership to notify the Secretary at least 60 days before the anticipated effective date of the change. The burden associated with the requirement is the time and effort necessary for a sponsor to comply with the reporting requirement. Based on our experience with the RDS Program, we estimate that it will take each sponsor an average of 1 hour to comply with these requirements, and that 50 sponsors per year will be subject to this requirement. The total estimated annual burden associated with this requirement is 50 hours. The total estimated annual cost associated with these requirements is $2,773.

All of the information collection requirements containing burden were submitted to the Office of Management and Budget (OMB) for emergency review and approval as part of a single information collection request (ICR). As part of the emergency review and approval process, OMB waived the notification requirements. The ICR was approved under OMB control number 0938–1087 with an expiration date of October 31, 2010. However, we are still seeking public comments on the information collection requirements discussed in this interim final rule with comment. All comments will be considered as we continue to develop the ICR as we must resubmit the ICR to obtain a standard 3-year approval.

TABLE 1—ANNUAL RECORDKEEPING AND REPORTING BURDEN

Regulation section	OMB Control No.	Respondents	Responses	Time per response (hours)	Total burden (hours)	Hourly labor cost ($)	Total labor cost ($)	Total capital/maintenance cost ($)	Total cost ($)
§ 149.35(b)(2)	0938–1087	4,500	13,500	1	13,500	74.51	1,005,885	0	1,005,885
		1,125	1,125	1	1,125	74.51	83,824	0	83,824
§ 149.35(b)(3)	0938–1087	3,000	9,000	20	180,000	55.46	9,982,800	0	9,982,800
		1,125	1,125	20	22,500	55.46	1,247,850	0	1,247,850
§ 149.40	0938–1087	4,500	4,500	35	157,500	**	8,820,675	0	8,820,675
§ 149.335	0938–1087	4,500	9,000	45	405,000	38.91	15,758,550	0	15,758,550
§ 149.350	0938–1087	4,500	4,500	6	27,000	38.91	1,050,570	0	1,050,570
§ 149.600	0938–1087	1,500	3,000	16	48,000	38.91	1,867,680	0	1,867,680
§ 149.700(c)	0938–1087	50	50	1	50	55.46	2,773	0	2,773
Total		11,300	45,800		854,675				39,820,607

**$74.51 per hour for 1 hour per response, $55.46 per hour for 34 hours per response.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this proposed rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: CMS Desk Officer, CMS–9996–IFC, fax (202) 395–6974, or via email *OIRA_submission@omb.eop.gov*.

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VI. Regulatory Impact Analysis

A. Overall Impact

We have examined the impacts of this rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, section 202 of the Unfunded

Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). This rule will be economically significant because it sets out the requirements that sponsors will need to meet in order to participate in the Early Retiree Reinsurance Program and obtain a portion of the $5 billion the Congress appropriated for this program. While a small portion of the funds will be used to administer the program, the remainder of the $5 billion will be paid to eligible sponsors over the life of the program, resulting in economically significant net positive transfers to sponsors. We believe that the costs imposed on sponsors that want to receive the early retiree reimbursement will not be significant relative to the payments received. The costs will consist of staff or contractor time to complete the application to participate, to file claims for reimbursement, and to comply with program requirements such as any requests related to an audit, as well as any supplies necessary to perform these tasks summarized in Table 1 above. As a result this rulemaking is "economically significant" as measured by the $100 million threshold, and hence also a major rule under the Congressional Review Act. Accordingly, we have prepared a regulatory impact analysis that to the best of our ability presents the costs and benefits of the rulemaking.

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. According to the Kaiser Family Foundation and Health Research & Educational Trust's 2009 Employer Health Benefits Survey, 5 percent of surveyed businesses with 3 to 199 workers offered retiree health benefits. See pg. 166 of the Survey. *http://ehbs.kff.org/pdf/2009/7936.pdf.* It is unclear how many offered health benefits to early retirees, but since there were about 3.3 million such firms (page 15 of the survey), even if only 5 percent provided such benefits, over 150,000 such firms would be eligible for the program. However, we estimate that the number of sponsors that will actually participate in the Early Retiree Reinsurance Program, will be similar to the number that participate in the Retiree Drug Subsidy Program. For purposes of the RFA, we estimate that 5 percent of sponsors are small entities as that term is used in the RFA (including small businesses, nonprofit organizations, and small governmental jurisdictions). Ultimately, the number of small businesses affected will depend upon how many small businesses apply for the reimbursement, which we do not currently know. What we do know is that we have made, and will make, the application and claims submission processes as simple as possible, while still protecting the integrity of the program. Therefore, if small businesses want to participate, they may do so.

Turning to small business providers, the great majority of hospitals and most other health care providers and suppliers are small entities, either by being nonprofit organizations or by meeting the Small Business Administration (SBA) definition of a small business (having revenues of less than $7.0 million to $34.5 million in any 1 year). While this rule does not directly impact providers (unless they apply to be sponsors), it does increase access to health insurance, which may then cause more individuals to be able to afford health care and therefore be able to utilize providers' services and products more often. Therefore, health care providers may see an increase in patients and may not be required to deliver health care free of charge or at reduced rates in as many instances as they may currently do.

Because much of the effect on health care providers depends upon where plan participants choose to receive these services, which must be from a provider that accepts the plan participant's coverage, the term "health care provider" is likely to include health care entities operated by small governmental entities such as counties or towns. Small governmental health care entities may include county hospitals, clinics or other such entities. Regardless of the entity, we expect a positive effect on these entities. For purposes of the RFA, a significant number of health care providers indirectly affected by the program are considered small businesses according to the SBA's size standards with total revenues of $7 million to $34.5 million or less in any 1 year and an undetermined percent are nonprofit organizations. Individuals and States are not included in the definition of a small entity. Uncertainty arises because we do not know how many small businesses or other small entities will apply to participate in the Early Retiree Reinsurance Program, nor do we know how the increased access to health insurance will affect small businesses that provide health care services and products to the participants affected by the program. We believe, however, that this interim final rule will have a significant positive economic effect on a substantial number of small businesses. The HHS interpretation of the Regulatory Flexibility Act has historically been that it does not trigger a regulatory flexibility analysis as a result of positive economic impacts (the statute requires that economic impacts be minimized, which makes no sense when applied to positive effects). The Department nonetheless usually prepares a voluntary regulatory flexibility analysis in such circumstances. In addition, because a regulatory flexibility analysis is only required for rules for which an NPRM must be prepared, there is an additional exemption that applies to this rule. Accordingly, we conclude that a regulatory flexibility analysis is not required. Nonetheless, we believe that this regulatory impact section, together with the remainder of the preamble, constitutes a voluntary analysis that meets the requirements that would otherwise be applicable.

In addition, section 1102(b) of the Act requires us to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. We do not believe this rule will have a significant impact on the operations of a substantial number of small rural hospitals because the increased access to health insurance, while positively affecting small rural hospitals' ability to collect payment for services rendered to plan participants affected by the program, will be unlikely to increase revenues in an economically significant amount. Therefore, the Secretary has determined that this interim final rule will not have a significant impact on the operations of a substantial number of small rural hospitals. In addition, such an analysis is not required when an NPRM is not required, as in this case.

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) also requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates required spending in any 1 year of $100

million in 1995 dollars, updated annually for inflation. In 2010, that threshold is approximately $135 million. This rule does not mandate any spending by State, local, or tribal governments in the aggregate, or by the private sector. In fact, participation in the program is voluntary and for all sponsors participating, we expect in the aggregate that sponsors will receive $5 billion in reimbursement, less administrative costs.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This rule will not have a substantial direct effect on State or local governments, preempt State laws, or otherwise have a Federalism implication.

B. Need for Regulatory Action

As previously discussed, the Affordable Care Act, includes this provision that establishes the temporary Early Retiree Reinsurance Program. Section 1102(a)(1) requires the Secretary to establish the program within 90 days of enactment of the law, which is June 21, 2010. This interim final rule is necessary to implement this program by the statutory deadline. The program is designed to assist people in the early retiree age group who often face difficulties obtaining insurance in the individual market because of advanced age or chronic conditions that make coverage unaffordable and inaccessible. The Early Retiree Reinsurance Program will provide financial help for employer-based plans to continue to provide coverage to plan participants, and provides financial relief to plan participants.

C. Anticipated Effects

1. Effects on Plan Sponsors

This rule will positively affect employers and employee organizations that self-fund health benefits or pay premiums to insure their early retirees' health benefits. The amount of the effects depends upon the sponsors' determination of the use of the reimbursement. Thus the positive effect will range from negligible if they use the reimbursement almost exclusively for plan participants' costs to just under $5 billion, minus the administrative costs of this program if they maximize the amount of reimbursement used to lower plan costs.

2. Effects on Plan Participants

We believe that this rule will have a positive effect on plan participants. We believe that the program will encourage sponsors to maintain coverage that they might not otherwise maintain, and will lower health benefit costs for plan participants and sponsors. With access to insurance, we believe, that plan participants will access health care as needed, instead of delaying a health care encounter until the condition progresses to a point when an encounter is unavoidable (and then more severe and expensive). Furthermore, we believe plan participants will not incur as much debt due to health care costs. The amount of the effects depends upon the sponsors' determination of the use of the reimbursement. Thus, the positive effect will range from moderate if sponsors use almost all of the reimbursement for sponsors' costs (in this case, the lower costs to the sponsor encourages continued provision of retiree coverage, which is of benefit to the retiree) to nearly $5 billion, minus administrative costs, if sponsors use the reimbursement almost exclusively to lower plan participants' costs.

3. Effects on Other Providers

We expect this rule to have an indirect positive effect on providers because more individuals will have access to health insurance, which will cause these individuals to seek health care when needed, as may not be the case currently, and health care providers will be able to receive payment for services provided. It is a two-fold benefit. Providers may have more patients and more of the patients will be able to pay for the services or products provided, whether directly (for example, co-insurance or co-payment) or via their insurance.

4. Effects on the Medicare and Medicaid Programs

This rule does not impose any consequential costs on Medicare or Medicaid. While sponsors may only submit claims for reimbursement for early retirees and early retirees' spouses, surviving spouses or dependents, the reimbursements paid to a sponsor must be used to lower costs for all plan participants, which may include enrollees who also have Medicare coverage. Other than increased utilization of health care services or products for plan participants that are covered by a certified plan, we do not expect any notable impact on Medicare. We expect the impact due to increased utilization to be minimal.

This rule may in fact lessen the number of individuals on Medicaid, or slow any growth in numbers of individuals eligible for Medicaid, because sponsors that are considering dropping health insurance for early retirees or plan participants may decide otherwise, once the sponsor becomes eligible for the program. Furthermore, it is possible that employers may decide to offer health insurance to early retirees because of the program.

D. Alternatives Considered

With respect to implementing this program, there is no alternative. The Congress requires that the program be in effect not later than 90 days after the enactment of the bill. The statute was enacted March 23, 2010. With respect to the application process, we considered numerous requirements as to what we would need in order to protect the integrity of the program, but ultimately settled on the requirements in the regulation. We had originally considered requiring an attestation from a qualified actuary, certifying that the sponsor's estimate of projected costs is reasonable. We decided against this requirement because the projection was merely for the purpose of letting us know if and when we should stop taking applications. Weighing the expense of requiring a sponsor to pay an actuary to make the certification against the benefit the certification would provide, we decided not to require this because we want this program to be as inclusive as possible.

We also considered how best to implement the provision relating to participants with chronic and high-cost conditions. We considered identifying specific conditions in sub-regulatory guidance but decided that such a policy would ultimately work against the goals of the program because we would not be able to do a comprehensive analysis to identify them in the time allotted to implement this program. Furthermore, because many sponsors' plans were initiated before the effective date of the statute and any guidance we may have developed, sponsors that covered what they think are chronic and high-cost conditions, but which we did not identify as such, would have been penalized. Because this is supposed to be an inclusive program, we defined the term "chronic and high-cost conditions" to be any condition for which the plan is likely to incur health benefits costs of at least $15,000 for any one plan participant in a plan year. If a sponsor has programs and procedures that have generated or have the potential to generate cost savings in place to address

any such conditions, it will meet the requirement.

Ultimately, the approach we took in these regulations is intended to balance the need to protect the integrity of the program with the inclusive nature of the program.

E. Accounting Statement and Table

Whenever a rule is considered an economically significant rule under Executive Order 12866, we are required to develop an Accounting Statement. We have prepared an accounting statement below (Table 2) showing the classification of the expenditures associated with the provisions of this interim final rule.

The terminology from this table may be interpreted as follows:

1. Annualized—means to determine cost/benefits on a yearly basis as opposed to quarterly. This would include both start-up and ongoing costs amortized over the number of years used in the RIA. Due to the uncertainty in estimating these costs/benefits we have estimated the amortization equally over the 4 years 2010 through 2013.

2. Monetized—means to develop quantitative estimates and convert them to dollar amounts, if possible.

3. Qualitative Benefits and Costs—means to categorize or rank the qualitative effects in terms of their importance (for example, certainty, likely magnitude, and reversibility).

4. Effects—means the effects on Medicare/Medicaid program, beneficiaries, and health care facilities, taken from the impact analysis. (We note that regulations with annual costs that are less than one billion dollars are likely to have a minimal effect on economic growth.)

5. All quantitative estimates must be presented as discounted flows using 3 percent and 7 percent factors.

TABLE 2—ACCOUNTING STATEMENT

Category	*Primary estimate*	*Year dollars*	*Discount rate*	*Period covered*	*Source citation (RIA, preamble, etc.)*
BENEFITS					
Annualized monetized benefits (in millions of dollars per year).	Not estimated.				
COSTS					
Annualized monetized costs (in millions of dollars per year).	39.8	2010	7%	2010–2013	Paperwork Reduction Act Burden in Preamble.
	39.8	2010	3%		
TRANSFERS					
Annualized monetized transfers: “on budget” (in millions of dollars per year).	$1,250	2010	7%	2010–2013	Statute.
	$1,250	2010	3%		
From whom to whom? ..	From the Federal Government to eligible sponsors and for administration of the program including to contractors.	From the Federal Government to eligible sponsors and for administration of the program including to contractors.	From the Federal Government to eligible sponsors and for administration of the program including to contractors.		
Category	Effects				*Source Citation (RIA, preamble, etc.).
Effects on State, local, and/or tribal governments.	Positive, but currently unable to be determined.				RIA.
Effects on small businesses.	Positive, but currently unable to be determined.				RIA.

E. Conclusion

We used statistics from the RDS Program as a model because it has similar characteristics to the characteristics of this new Early Retiree Reinsurance Program, and, based on this model, we expect that approximately 4,500 sponsors will apply to participate in the Early Retiree Reinsurance Program. Of those sponsors, we expect approximately 3,000 will be private entities and 1,500 will be State and local governments. Alternatively, the number of applicants could be substantially higher if small or other employers participate in this program in higher numbers than they did in the Retiree Drug Subsidy Program. Regardless, total spending cannot exceed the $5 billion appropriated for this program over the four-year period. While some of the funds allotted for the program are required to be used to implement the program, we anticipate an overall positive transfer of $5 billion to eligible sponsors (and indirectly a portion of those funds will be transferred for the benefit of plan participants), less administrative costs. The analysis above, together with the remainder of this preamble, provides a regulatory impact analysis and meets the

requirements for a Final Regulatory Flexibility Analysis.

In accordance with the provisions of Executive Order 12866 the Office of Management and Budget reviewed this regulation.

List of Subjects in 45 CFR Part 149

Administrative practice and procedure, Health care, Health insurance, Penalties, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Department of Health and Human Services amends 45 CFR subtitle A, subchapter B, by adding a new part 149 to read as follows:

PART 149—REQUIREMENTS FOR THE EARLY RETIREE REINSURANCE PROGRAM

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149.2 Definitions.

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149.610 Secretary's authority to reopen and revise reimbursement determination amounts.

Subpart H—Change of Ownership Requirements

149.700 Change of ownership requirements.

Authority: Section 1102 of the Patient Protection and Affordable Care Act (Pub. L. 111–148).

Subpart A—General Provisions

§ 149.1 Purpose and basis.

This part implements the Early Retiree Reinsurance Program, as required by section 1102 of the Patient Protection and Affordable Care Act (Pub. L. 111–148).

§ 149.2 Definitions.

For purposes of this part, the following definitions apply:

Authorized representative means an individual with legal authority to sign and bind a sponsor to the terms of a contract or agreement.

Benefit option means a particular benefit design, category of benefits, or cost-sharing arrangement offered within an employment-based plan.

Certified means that the sponsor and its employment-based plan or plans meet the requirements of this part and the sponsor's application to participate in the program has been approved by the Secretary.

Chronic and high-cost condition means a condition for which $15,000 or more in health benefit claims are likely to be incurred during a plan year by one plan participant.

Claim or *medical claim* means documentation, in a form and manner to be specified by the Secretary, indicating the health benefit provided, the provider or supplier, the incurred date, the individual for whom the health benefit was provided, the date and amount of payment net any known negotiated price concessions, and the employment-based plan and benefit option under which the health benefit was provided. The terms *claim* or *medical claim* include medical, surgical, hospital, prescription drug and other such claims as determined by the Secretary.

Early retiree means a plan participant who is age 55 and older who is enrolled for health benefits in a certified employment-based plan, who is not eligible for coverage under title XVIII of the Act, and who is not an active employee of an employer maintaining, or currently contributing to, the employment-based plan or of any employer that has made substantial contributions to fund such plan. In this part, the term *early retiree* also includes the enrolled spouse, surviving spouse, and dependents of such individuals. The determination of whether an individual is not an active employee is made by the sponsor in accordance with the rules of its plan. For purposes of this subpart, however, an individual is presumed to be an active employee if, under the Medicare Secondary Payer rules in 42 CFR 411.104 and related guidance published by the Centers for Medicare & Medicaid Services, the person is considered to be receiving coverage by reason of current employment status. This presumption applies whether or not the Medicare Secondary Payer rules actually apply to the sponsor. For this purpose, a sponsor may also treat a person receiving coverage under its employment-based plan as a dependent in accordance with the rules of its plan, regardless of whether that individual is considered a dependent for Federal or state tax purposes. For purposes of this definition of early retiree, an employer maintaining, or currently contributing to, the employment-based plan or any employer that has made substantial contributions to fund such plan, means a plan sponsor (as defined in this section).

Employment-based plan means a group health plan as defined in this section of the regulation.

Good cause means:

(1) New and material evidence exists that was not readily available at the time the reimbursement determination was made;

(2) A clerical error in the computation of the reimbursement determination was made by the Secretary; or

(3) The evidence that was considered in making the reimbursement determination clearly shows on its face that an error was made.

Group health plan means group health plan as defined in 42 CFR 423.882 that provides health benefits to early retirees, but excludes Federal governmental plans.

Health benefits means medical, surgical, hospital, prescription drug, and other benefits that may be specified by the Secretary, whether self-funded or delivered through the purchase of health insurance or otherwise. Such benefits include benefits for the diagnosis, cure, mitigation, or prevention of physical or mental disease or condition with respect to any structure or function of the body. Health benefits do not include benefits specified at 45 CFR 146.145(c)(2) through (4).

Incurred means the point in time when the sponsor, health insurance issuer (as defined in 45 CFR 160.103), employment-based plan, plan participant, or a combination of these or

similar stakeholders, become responsible for payment of the claim.

Negotiated price concession means any direct or indirect remuneration (including discounts, direct or indirect subsidies, charge backs or rebates, cash discounts, free goods contingent on a purchase agreement, up-front payments, coupons, goods in kind, free or reduced-price services, grants, or other price concessions or similar benefits) offered to some or all purchasers, which may include a sponsor, a health insurance issuer, or an employment-based plan) that would serve to decrease the costs incurred under the employment-based plan.

Plan participant means anyone enrolled in an applicable plan including an early retiree, as defined in this section, a retiree, a retiree's spouse and dependent, an active employee and an active employee's spouse and dependent.

Plan year means the year that is designated as the plan year in the plan document of an employment-based plan, except that if the plan document does not designate a plan year, if the plan year is not a 12-month plan year, or if there is no plan document, the plan year is:

(1) The deductible or limit year used under the plan;

(2) The policy year, if the plan does not impose deductibles or limits on a 12-month basis;

(3) The sponsor's taxable year, If the plan does not impose deductibles or limits on a 12-month basis, and either the plan is not insured or the insurance policy is not renewed on a 12-month basis, or;

(4) The calendar year, in any other case.

Post point-of-sale negotiated price concession means any negotiated price concession that an employment-based plan or insurer receives with respect to a given health benefit, after making payment for that health benefit.

Program means the Early Retiree Reinsurance Program established in section 1102 of the Patient Protection and Affordable Care Act.

Secretary means the Secretary of the United States Department of Health & Human Services or the Secretary's designee.

Sponsor means a plan sponsor as defined in section 3(16)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(16)(B), except that in the case of a plan maintained jointly by one employer and an employee organization and for which the employer is the primary source of financing, the term means the employer.

Sponsor agreement means an agreement between the sponsor and the United States Department of Health & Human Services, or its designee, which is made to comply with the provisions of this part.

Subpart B—Requirements for Eligible Employment-Based Plans

§ 149.30 General requirements.

A sponsor is eligible to participate in the program if it meets the requirements of section 1102 of the Patient Protection and Affordable Care Act, this part, and guidance developed by the Secretary.

§ 149.35 Requirements to participate.

(a) A sponsor's employment-based plan must—

(1) Be certified by the Secretary.

(2) Include programs and procedures that have generated or have the potential to generate cost-savings with respect to plan participants with chronic and high-cost conditions.

(b) A sponsor must—

(1) Make available information, data, documents, and records as specified in § 149.350.

(2) Have a written agreement with its health insurance issuer (as defined in 45 CFR 160.103) or employment-based plan (as applicable) regarding disclosure of information, data, documents, and records, to the Secretary, and the health insurance issuer or employment-based plan must disclose to the Secretary, on behalf of the sponsor, at a time and in a manner specified by the Secretary in guidance, the information, data, documents and records necessary for the sponsor to comply with the program, this part, and program guidance.

(3) Ensure that policies and procedures to protect against fraud, waste and abuse under this program are in place, and must comply timely with requests from the Secretary to produce the policies and procedures and any documents or data to substantiate the implementation of the policies and procedures and their effectiveness.

(4) Submit an application to the Secretary in the manner, and at the time, required by the Secretary as specified in § 149.40.

§ 149.40 Application.

(a) The applicant must submit an application to participate in this program to the Secretary, which is signed by an authorized representative of the applicant who certifies that the information contained in the application is true and accurate to the best of the authorized representative's knowledge and belief.

(b) Applications will be processed in the order in which they are received.

(c) An application that fails to meet all the requirements of this part will be denied and the applicant must submit another application if it wishes to participate in the program. The new application will be processed based on when the new submission is received.

(d) An applicant need not submit a separate application for each plan year but must identify in its application the plan year start and end date cycle (starting month and day, and ending month and day) for which it is applying.

(e) An applicant must submit an application for each plan for which it will submit a reimbursement request.

(f) In connection with each application the applicant must submit the following:

(1) Applicant's Tax Identification Number.

(2) Applicant's name and address.

(3) Contact name, telephone number and email address.

(4) Plan sponsor agreement signed by an authorized representative, which includes—

(i) An assurance that the sponsor has a written agreement with its health insurance issuer (as defined in 45 CFR 160.103) or employment-based plan, as applicable, regarding disclosure of information to the Secretary, and the health insurance issuer or employment-based plan must disclose to the Secretary, on behalf of the sponsor, at a time and in a manner specified by the Secretary in guidance, information, data, documents, and records necessary for the sponsor to comply with the requirements of the program.

(ii) An acknowledgment that the information in the application is being provided to obtain Federal funds, and that all subcontractors acknowledge that information provided in connection with a subcontract is used for purposes of obtaining Federal funds.

(iii) An attestation that policies and procedures are in place to detect and reduce fraud, waste, and abuse, and that the sponsor will produce the policies and procedures, and necessary information, records and data, upon request by the Secretary, to substantiate existence of the policies and procedures and their effectiveness.

(iv) Other terms and conditions required by the Secretary.

(5) A summary indicating how the applicant will use any reimbursement received under the program to meet the requirements of the program, including:

(i) How the reimbursement will be used to reduce premium contributions, co-payments, deductibles, coinsurance, or other out-of-pocket costs for plan

participants, to reduce health benefit or health benefit premium costs for the sponsor, or to reduce any combination of these costs;

(ii) What procedures or programs the sponsor has in place that have generated or have the potential to generate cost savings with respect to plan participants with chronic and high-cost conditions; and

(iii) How the sponsor will use the reimbursement to maintain its level of contribution to the applicable plan.

(6) Projected amount of reimbursement to be received under the program for the first two plan year cycles with specific amounts for each of the two cycles.

(7) A list of all benefit options under the employment-based plan that any early retiree for whom the sponsor receives program reimbursement may be claimed.

(8) Any other information the Secretary requires.

(g) An application must be approved, and the plan and the sponsor certified, by the Secretary before a sponsor may request reimbursement under the program.

(h) The Secretary may reopen a determination under which an application had been approved or denied:

(1) Within 1 year of the determination for any reason;

(2) Within 4 years of the determination if the evidence that was considered in making the determination shows on its face that an error was made; or

(3) At any time in instances of fraud or similar fault.

§ 149.41 Consequences of Non-Compliance, Fraud, or Similar Fault.

Upon failure to comply with the requirements of this part, or if fraud, waste, and abuse, or similar fault are found, the Secretary may recoup or withhold funds, terminate or deny a sponsor's application, or take a combination of these actions.

§ 149.45 Funding limitation.

(a) Based on the projected or actual availability of program funding, the Secretary may deny applications that otherwise meet the requirements of this part, and if an application is approved, may deny all or part of a sponsor's reimbursement request.

(b) The Secretary's decision to stop accepting applications or satisfying reimbursement requests based on the availability of funding is final and binding, and is not appealable.

Subpart C—Reinsurance Amounts

§ 149.100 Amount of reimbursement.

(a) For each early retiree enrolled in a certified plan in a plan year, the sponsor receives reimbursement in the amount of 80 percent of the costs for health benefits (net of negotiated price concessions for health benefits) for claims incurred during the plan year that are attributed to health benefits costs between the cost threshold and cost limit, and that are paid by the employment-based plan or by the insurer (if an insured plan), and by the early retiree.

(b) Costs are considered paid by an early retiree, if paid by that individual or another person on behalf of the early retiree, and the early retiree (or person paying on behalf of the early retiree) is not reimbursed through insurance or otherwise, or other third party payment arrangement.

(c) Reimbursement is calculated by first determining the costs for health benefits net of negotiated price concessions, within the applicable plan year for each early retiree, and then subtracting amounts below the cost threshold and above the cost limit within the applicable plan year for each such individual.

(d) For purposes of determining amounts below the cost threshold and above the cost limit for any given early retiree, all costs for health benefits paid by the employment-based plan (or by the insurer, if applicable), or by or on behalf of, an early retiree, for all benefit options the early retiree is enrolled in with respect to a given certified employment-based plan for a given plan year, will be combined. For each early retiree enrolled in an employment-based plan, there is only one cost threshold and one cost limit per plan year regardless of the number of benefit options the early retiree is enrolled in during that plan year.

§ 149.105 Transition provision.

For a certified plan that has a plan year that begins before June 1, 2010 and ends on any date thereafter, the reinsurance amount for the plan year must be determined as follows:

(a) With respect to claims incurred before June 1, 2010, the amount of such claims up to $15,000 count toward the cost threshold and the cost limit. The amount of claims incurred before June 1, 2010 that exceed $15,000 are not eligible for reimbursement and do not count toward the cost limit.

(b) The reinsurance amount to be paid is based only on claims incurred on and after June 1, 2010, that fall between the cost threshold and cost limit for the plan year.

§ 149.110 Negotiated price concessions.

(a) The amount of negotiated price concessions that will be taken into account in determining the reinsurance amount will reflect negotiated price concessions that have already been subtracted from the amount the employment-based plan or insurer paid for the cost of health benefits and the amount of post-point-of-sale negotiated price concessions received.

(b) At a time specified by the Secretary, sponsors are required to disclose the amount of post-point-of-sale price concessions that were received but not accounted for in their submitted claims.

§ 149.115 Cost threshold and cost limit.

The following cost threshold and cost limits apply individually, to each early retiree as defined in § 149.2:

(a) The cost threshold is equal to $15,000 for plan years that start on any date before October 1, 2011.

(b) The cost limit is equal to $90,000 for plan years that start on any date before October 1, 2011.

(c) The cost threshold and cost limit specified in paragraphs (a) and (b) of this section, for plan years that start on or after October 1, 2011, will be adjusted each fiscal year based on the percentage increase in the Medical Care Component of the Consumer Price Index for all urban consumers (rounded to the nearest multiple of $1,000) for the year involved.

Subpart D—Use of Reimbursements

§ 149.200 Use of reimbursements.

(a) A sponsor must use the proceeds under this program:

(1) To reduce the sponsor's health benefit premiums or health benefit costs,

(2) To reduce health benefit premium contributions, copayments, deductibles, coinsurance, or other out-of-pocket costs, or any combination of these costs, for plan participants, or

(3) To reduce any combination of the costs in (a)(1) and (a)(2) of this section.

(b) Proceeds under this program must not be used as general revenue for the sponsor.

Subpart E—Reimbursement Methods

§ 149.300 General reimbursement rules.

Reimbursement under this program is conditioned on provision of accurate information by the sponsor or its designee. The information must be submitted, in a form and manner and at the times provided in this subpart and

other guidance specified by the Secretary. A sponsor must provide the information specified in section § 149.335.

§ 149.310 Timing.

(a) An employment-based plan and a sponsor must be certified by the Secretary before claims can be submitted and a reimbursement request may be made. Reimbursement will be made with respect to submitted claims for health benefits at a time and in a manner to be specified by the Secretary, after the sponsor or its designee submits the claims to the Secretary. Claims must satisfy the requirements of this subpart in order to be eligible for reimbursement.

(b) Claims for health benefits may be submitted for a given plan year only upon the approval of an application that references that plan year cycle. Claims for an early retiree for a plan year cannot be submitted until the total paid costs for health benefits for that early retiree incurred for that plan year exceed the applicable cost threshold.

(c) For employment-based plans for which a provider in the normal course of business does not produce a claim, such as a staff-model health maintenance organization, the information required in a claim must be produced and provided to the Secretary, as set out in this regulation and applicable guidance.

§ 149.315 Reimbursement conditioned upon available funds.

Notwithstanding a sponsor's compliance with this part, reimbursement is conditioned upon the availability of program funds.

§ 149.320 Universe of claims that must be submitted.

(a) Claims submitted for an early retiree, as defined in § 149.2, must include claims below the applicable cost threshold for the plan year.

(b) Claims must not be submitted until claims are submitted for amounts that exceed the applicable cost threshold for the plan year for the early retiree.

(c) Sponsors must not submit claims for health benefits for an early retiree to the extent the sponsor has already submitted claims for the early retiree that total more than the applicable cost limit for the applicable plan year.

§ 149.325 Requirements for eligibility of claims.

A claim may be submitted only if it represents costs for health benefits for an early retiree, as defined in § 149.2, has been incurred during the applicable plan year, and has been paid.

§ 149.330 Content of claims.

Each claim on its face must include the information specified in, and meet, the definition of claim or medical claim found at § 149.2.

§ 149.335 Documentation of costs of actual claims involved.

(a) A submission of claims consists of a list of early retirees for whom claims are being submitted, and documentation of the actual costs of the items and services for claims being submitted, in a form and manner specified by the Secretary.

(b) In order for a sponsor to receive reimbursement for the portion of a claim that an early retiree paid, the sponsor must submit prima facie evidence that the early enrollee paid his or her portion of the claim.

§ 149.340 Rule for insured plans.

With respect to insured plans, the claims and data specified in the subpart may be submitted directly to the Secretary by the insurer.

§ 149.345 Use of information provided.

The Secretary may use data and information collected under this section only for the purpose of, and to the extent necessary in, carrying out this part including, but not limited to, determining reimbursement and reimbursement-related oversight and program integrity activities, or as otherwise allowed by law. Nothing in this section limits the Office of the Inspector General's authority to fulfill the Inspector General's responsibilities in accordance with applicable Federal law.

§ 149.350 Maintenance of records.

(a) The sponsor of the certified plan (or a subcontractor, as applicable) must maintain and furnish to the Secretary, upon request the records enumerated in paragraph (b) of this section. The records must be maintained for 6 years after the expiration of the plan year in which the costs were incurred, or longer if otherwise required by law.

(b) The records that must be retained are as follows—

(1) All documentation, data, and other information related to this part.

(2) Any other records specified by the Secretary.

(c) The Secretary may issue additional guidance addressing recordkeeping requirements, including (but not limited to) the use of electronic media.

(d) The sponsor must require its health insurance issuer or employment-based plan, as applicable, to maintain and produce upon request records to satisfy subparagraph (a) of this regulation.

(e) The sponsor is responsible for ensuring that the records are maintained and provided according to this subpart.

Subpart F—Appeals

§ 149.500 Appeals.

(a) An adverse reimbursement determination is final and binding unless appealed pursuant to paragraph (e) of this section.

(b) Except as provided in paragraph (c) of this section, a sponsor may request an appeal of an adverse reimbursement determination.

(c) A sponsor may not appeal an adverse reimbursement determination if the denial is based on the unavailability of funds.

(d) An adverse reimbursement determination is a determination constituting a complete or partial denial of a reimbursement request.

(e) If a sponsor appeals an adverse reimbursement determination, the sponsor must submit the appeal in writing to the Secretary within 15 calendar days of receipt of the determination pursuant to guidance issued by the Secretary.

§ 149.510 Content of request for appeal.

The request for appeal must specify the findings or issues with which the sponsor disagrees and the reasons for the disagreements. The request for appeal may include supporting documentary evidence the sponsor wishes the Secretary to consider.

§ 149.520 Review of appeals.

(a) In conducting review of the appeal, the Secretary reviews the appeal, the evidence and findings upon which the adverse reimbursement determination was made, and any other written evidence submitted by the sponsor or the Secretary's designee and will provide a ruling on the appeal request.

(b) In conducting the review, the Secretary reviews the determination at issue, the evidence and findings upon which it was based, any written documents submitted to the Secretary by the sponsor and the Secretary's designee, and determines whether to uphold, reverse or modify the Secretary's initial reimbursement determination.

(c) A decision by the Secretary under this provision is final and binding.

(d) Regardless of the Secretary's decision, additional reimbursement is contingent upon the availability of funds at the time of the Secretary's determination.

(e) The Secretary informs the sponsor and the applicable Secretary's designee

of the decision. The Secretary sends a written decision to the sponsor or the applicable Secretary's designee upon request.

Subpart G—Disclosure of Data Inaccuracies

§ 149.600 Sponsor's duty to report data inaccuracies.

A sponsor is required to disclose any data inaccuracies upon which a reimbursement determination is made, including inaccurate claims data and negotiated price concessions, in a manner and at a time specified by the Secretary in guidance.

§ 149.610 Secretary's authority to reopen and revise a reimbursement determination.

(a) The Secretary may reopen and revise a reimbursement determination upon the Secretary's own motion or upon the request of a sponsor:

(1) Within 1 year of the reimbursement determination for any reason.

(2) Within 4 years of a reimbursement determination for good cause.

(3) At any time, in instances of fraud or similar fault.

(b) For purposes of this section, the Secretary does not find good cause if the only reason for the revision is a change of legal interpretation or administrative ruling upon which the determination to reimburse was made.

(c) A decision by the Secretary not to revise a reimbursement determination is final and binding (unless fraud or similar fault is found) and cannot be appealed.

Subpart H—Change of Ownership Requirements

§ 149.700 Change of ownership requirements.

(a) *Change of ownership consists of:*

(1) *Partnership.* The removal, addition, or substitution of a partner, unless the partners expressly agree otherwise as permitted by applicable state law.

(2) *Asset sale.* Transfer of all or substantially all of the assets of the sponsor to another party.

(3) *Corporation.* The merger of the sponsor's corporation into another corporation or the consolidation of the sponsor's organization with one or more other corporations, resulting in a new corporate body.

(b) *Change of ownership; exception.* Transfer of corporate stock or the merger of another corporation into the sponsor's corporation, with the sponsor surviving, does not ordinarily constitute change of ownership.

(c) *Advance notice requirement.* A sponsor that has a sponsor agreement in effect under this part and is considering or negotiating a change in ownership must notify the Secretary at least 60 days before the anticipated effective date of the change.

(d) *Assignment of agreement.* When there is a change of ownership as specified in paragraph (a) of this section, and this results in a transfer of the liability for health benefits, the existing sponsor agreement is automatically assigned to the new owner.

(e) *Conditions that apply to assigned agreements.* The new owner to whom a sponsor agreement is assigned is subject to all applicable statutes and regulations and to the terms and conditions of the sponsor agreement.

(f) Failure to notify the Secretary at least 60 days before the anticipated effective date of the change may result in the Secretary recovering funds paid under this program.

Dated: April 29, 2010.

Jay Angoff,

Director, Office of Consumer Information and Insurance Oversight.

Dated: April 29, 2010

Kathleen Sebelius,

Secretary.

[FR Doc. 2010–10658 Filed 5–4–10; 8:45 am]

BILLING CODE 4150–03–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 159

RIN 0991–AB63

Health Care Reform Insurance Web Portal Requirements

AGENCY: Office of the Secretary, HHS.

ACTION: Interim final rule with comment period.

SUMMARY: The Patient Protection and Affordable Care Act (the Affordable Care Act) was enacted on March 23, 2010. It requires the establishment of an internet Web site (hereinafter referred to as a Web portal) through which individuals and small businesses can obtain information about the insurance coverage options that may be available to them in their State. The Department of Health and Human Services (HHS) is issuing this interim final rule in order to implement this mandate. This interim final rule adopts the categories of information that will be collected and displayed as Web portal content, and the data we will require from issuers and request from States, associations, and high risk pools in order to create this content.

DATES: *Effective Date:* These regulations are effective on May 10, 2010.

Comment Date: To be assured consideration, comments must be received at the address provided below, no later than 5 p.m. on June 4, 2010.

ADDRESSES: In commenting, please refer to file code DHHS–9997–IFC. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

You may submit comments in one of four ways (please choose only one of the ways listed):

- *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the instructions on the home page.
- *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: DHHS–9997–IFC, P.O. Box 8014, Baltimore, MD 21244–8014.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

- *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: DHHS–9997–IFC, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.
- *By hand or courier.* If you prefer, you may deliver (by hand or courier) your written comments before the close of the comment period to either of the following addresses:

a. For delivery in Washington, DC—Centers for Medicare & Medicaid Services, Department of Health and Human Services, Room 445–G, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201

(Because access to the interior of the Hubert H. Humphrey Building is not readily available to persons without Federal government identification, commenters are encouraged to leave their comments in the CMS drop slots located in the main lobby of the building. A stamp-in clock is available for persons wishing to retain a proof of filing by stamping in and retaining an extra copy of the comments being filed.)

b. For delivery in Baltimore, MD—Centers for Medicare & Medicaid Services, Department of Health and Human Services, 7500 Security Boulevard, Baltimore, MD 21244–1850.

If you intend to deliver your comments to the Baltimore address,

please call telephone number (410) 786–9994 in advance to schedule your arrival with one of our staff members.

Comments mailed to the addresses indicated as appropriate for hand or courier delivery may be delayed and received after the comment period.

Submission of comments on paperwork requirements. You may submit comments on this document's paperwork requirements by following the instructions at the end of the "Collection of Information Requirements" section in this document.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Danielle Harris, (410) 786–1819.

SUPPLEMENTARY INFORMATION: *Inspection of Public Comments:* All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following Web site as soon as possible after they have been received: *http://regulations.gov.* Follow the search instructions on that Web site to view public comments.

Comments received timely will be also available for public inspection as they are received, generally beginning approximately 3 weeks after publication of a document, at the headquarters of the Centers for Medicare & Medicaid Services, 7500 Security Boulevard, Baltimore, Maryland 21244, Monday through Friday of each week from 8:30 a.m. to 4 p.m. To schedule an appointment to view public comments, phone 1–800–743–3951.

I. Background

The Patient Protection and Affordable Care Act (Pub. L. 111–148), hereinafter referred to as the Affordable Care Act, was enacted on March 23, 2010. Section 1103(a), as amended by section 10102(b) of the same act, directs the Secretary to immediately establish a mechanism, including an internet Web site, through which a resident of, or small business in, any State may identify affordable health insurance coverage options in that State.

In implementing these requirements, we seek to develop a Web site (hereinafter called the Web portal) that would empower consumers by increasing informed choice and promoting market competition. To achieve these ends, we intend to provide a Web portal that provides information to consumers in a clear, salient, and easily navigated manner. We plan to minimize the use of technical language, jargon, or excessive complexity in order to promote the ability of consumers to understand the information and act in accordance with what they have learned. We will engage in careful consumer testing to identify the best methods to achieve these goals.

In obtaining information to populate the Web portal, we will be seeking all the statutorily required information from issuers, and we anticipate adopting electronic submission capabilities. As we develop the Web portal, and engage with consumers, this information will be used to create an effective consumer-friendly presentation of affordable health coverage option plans. In addition, we plan to provide information, consistent with applicable laws, in a format that is accessible for use by members of the public, allowing them to download and repackage the information, promoting innovation and the goal of consumer choice.

As we develop the Web portal, we are also seeking to balance the need to obtain information that will promote informed choice with the principles of the Paperwork Reduction Act and Executive Order 12866, which call for minimizing burdens and maximizing net benefits. To that end, we are seeking comments on how best to achieve that balance, and in particular how to reduce unnecessary burdens on the private sector.

This is an interim final rule that becomes effective May 10, 2010. We invite public comments on all relevant issues to make improvements.

A. Statutory Basis

As discussed above, Section 1103(a)of the Affordable Care Act, as amended by section 10102(b) of the same act, directs the Secretary to immediately establish a mechanism, including an internet Web site, through which a resident of, or small business in, any State may identify affordable health insurance coverage options in that State. To the extent practicable, the Web site (hereinafter called the Web portal) is to provide, at minimum, information on the following coverage options:

1. Health insurance coverage offered by health insurance issuers,

2. Medicaid coverage,

3. Children's Health Insurance Program (CHIP) coverage,

4. State health benefits high risk pool coverage,

5. Coverage under the high risk pool created by section 1101 of the Affordable Care Act, and

6. Coverage within the small group market for small businesses and their employees.

In order to provide this information in a standardized format, section 1103(b) requires the Secretary to develop a standardized format to present the coverage information described above. This format is to provide for, at a minimum, the inclusion of information on the percentage of total premium revenue expended on nonclinical costs (as reported under section 2718(a) of the Public Health Service Act), eligibility, availability, premium rates, and cost sharing with respect to such coverage options. The format must be consistent with the standards that are adopted for the uniform explanation of coverage under section 2715 of the Public Health Service Act. Defining the minimum content of the format required under section 1103(b) in effect defines what we will publish as the minimum content of the Web portal. This regulation, therefore, specifies the data that will be collected and disseminated through the Web portal in accordance with 1103(a) as amended by section 10102(b).

B. General Overview

Section 1103(a) of the Affordable Care Act, as amended by section 10102(b) of the same act, requires the establishment of a Web portal through which individuals can obtain information about the health insurance options that may be available to them in their "State." Section 1304(d) of the Affordable Care Act defines "State" to include the fifty states and the District of Columbia. The territories are not included in this definition. We therefore will interpret "State" in the Web portal context to mean the 50 States and the District of Columbia.

By statute, the Web portal must be available for public use no later than July 1, 2010. We will use the data collections and processes described in this rule to make the initial release of the Web portal available to the public on July 1, 2010, through a government sponsored Web site. We intend for the future development and updating of the Web portal to be an evolutionary process that involves all stakeholders, and we anticipate future updates, including annual and periodic revisions, to be released as the result of a continued refinement of the Web portal content.

In the July 1, 2010 release we will provide summary information about health insurance products that are available in the individual and small business markets including issuers of the products, types of products,

location, summaries of services offered, links to provider networks, and contact information (including Web site links and customer service telephone contact) to enable interaction with specific issuers. In addition, the Web portal will provide information on eligibility, coverage limitations and premium information for existing high risk pools operating in the States, to the extent that it is provided to us by the responding parties. It will also provide introductory information on eligibility and services for Medicaid and CHIP. We will include contact information and Web site links for the Medicaid and CHIP programs for individuals who believe that they or family members may meet eligibility criteria. In addition, we will provide information on coverage options for small businesses, including reinsurance for early retirees under section 1102 of the Affordable Care Act (which is being administered by HHS), and tax credits available under section 45R of the Internal Revenue Code, as added by section 1421 of the Affordable Care Act. We also will include Web site links to these programs so that small businesses can obtain further information.

We note that Section 1103(b)(1) requires the Secretary to present the Web portal information in a format that is consistent with the standards that are adopted for the uniform explanation of coverage under section 2715 of the Public Health Service Act (PHSA) as added by section 1001(a) of the Affordable Care Act. Section 2715 of the PHSA provides for the establishment of these standards within 12 months of the Affordable Care Act's enactment date. As a result, these standards will not be in place for the July 1, 2010 release of the Web portal. We will modify the format used to present the initial release of the Web portal to ensure Web portal consistency with these standards in accordance with the implementation schedule that is established for these standards.

In an effort to make the Web portal as comprehensive as possible, we will enhance the content over time to include more than the statutory minimum requirements that are discussed above. We will include any information that we have that we believe would be useful to consumers, such as medical loss ratios, quality and performance information, links to appropriate Web sites such as the Web site of the association that represents existing State health benefits high risk pools, and more State-specific information on Medicaid and CHIP eligibility and service coverage. Because of the complexity of pricing information and the need to incorporate pricing engines into the Web site, detailed pricing and benefit information will be provided in the second release of the Web portal on October 1, 2010.

As we discuss in more detail in section III "Waiver of Proposed Rulemaking and the 30-Day Delay in the Effective Date," the statutory requirement for a July 1, 2010 Web portal release does not allow time for full notice and comment rulemaking. While this timeframe necessitates going directly to final, in order to maximize public input we are using an interim final rule with comment to establish the categories of information that we will collect for inclusion in the Web portal, including the data production requirements that we impose on health insurance issuers, and the data collection requests for States, associations, and high risk pools.

II. Provisions of the Interim Final Rule

A. Definitions

For any terms defined by the Affordable Care Act, including the definitions in section 1304, as well as any definitions in the Public Health Service Act that are incorporated by reference under sections 1301(b) or 1551 of the Affordable Care Act, we adopt those definitions. We discuss these definitions below. The regulatory text provides cross references to these provisions. We also explain here how we are defining the terms that are not defined in the Affordable Care Act or the PHSA. These terms are "State health benefits high risk pool," "section 1101 high risk pool," "health insurance product" and "portal plan."

Section 2791(b)(1) of the PHSA, as incorporated by reference into the Affordable Care Act, defines "health insurance coverage" as "benefits consisting of medical care (provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care) under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer." Section 2791(b)(2) in turn defines an insurance issuer (also referred to here as an "issuer") to be an entity "licensed to engage in the business of insurance in a State and which is subject to State law which regulates insurance" and specifies that it does not include a group health plan.

For purposes of the Affordable Care Act and the PHSA, a distinction is made between health insurance coverage sold to group health plans, and other health insurance coverage. The term "group health plan," as defined in section 2791(a)(1) of the PHSA, exclusively refers to health coverage sold to group health plans. Section 1304(a)(2) of the Affordable Care Act, which adopts the identical definition as section 2791(e)(1)(A) of the PHSA, defines "individual market" as the "market for health insurance coverage offered to individuals other than in connection with a group health plan."

Section 2791(b)(5) of the PHSA in turn defines "individual health insurance coverage" as health insurance coverage "offered to individuals in the individual market, but does not include short-term limited duration insurance."

The Affordable Care Act and the PHSA further divide the group health insurance market into coverage sold to large employers (the "large group market," and coverage sold to small employers (the "small group market"). See section 1304(a)(3) of Affordable Care Act. Section 1304(b)(2) of the Affordable Care Act defines a "small employer" as, in connection with a group health plan with respect to a calendar year and a plan year, an employer who employed an average at least 1, but not more than 100 employees on business days during the preceding calendar year, and who employs at least 1 employee on the first day of the plan year. Section 1304(b)(3) of the Affordable Care Act allows for a State to elect the option to define "small employer" as an employer who employed on average at least 1, but not more than 50 employees on business days during the preceding calendar year in the case of plan years beginning before January 1, 2016. As such, for any State that elects this option, we would apply this alternate definition of "small employer" for their State for plan years beginning before January 1, 2016.

For purposes of this regulation, we will refer to health insurance coverage offered to employees of small employers in the small group market as "small group coverage."

Sections 1103(a)(2)(D) of the Affordable Care Act provides for Web portal reporting of "State health benefits high risk pools." For the purpose of this rule, we define "State health benefits high risk pools" as nonprofit organizations created by State law to offer comprehensive health coverage to individuals who otherwise would be unable to secure such coverage because of their health status. This language was adopted, with modification, from the National Association of Comprehensive Health Insurance Plans (NASCHIP) annual report. Our understanding is that this definition is generally understood to identify existing high risk pools.

Section 1103(a)(2)(E) provides for Web portal reporting of pools established pursuant to section 1101 of the Affordable Care Act. For purposes of this regulation, we define "section 1101 high risk pools" as any entity described in regulations implementing section 1101 of the Affordable Care Act.

The Affordable Care Act and the PHSA do not include the term "health insurance product." We are creating this term as a short hand reference to the information that we will publish in the first release of the Web portal. This term is needed in order to differentiate the information that will be collected for the July 1, 2010 release and the post-July 1, 2010 releases. We define "health insurance product" ("product") as a package of benefits that an issuer offers that is reported to State regulators in an insurance filing.

The Affordable Care Act and the PHSA also do not define the term "portal plan." We are creating this term to describe certain data that we will collect and disseminate in post-July 1, 2010 releases of the Web portal. We understand that consumers apply for coverage under individual health insurance products that issuers develop and market to offer a package of benefits. In applying for a package of benefits, we further understand that consumers are offered a range of cost-sharing arrangements, including deductibles and copayments but not including premium rates or premium rate quotes. As a result, each package of benefits can be paired with a multitude of cost sharing options. We will use the word "portal plan" to refer to the discrete pairing of a package of benefits with a particular cost-sharing option (not including premium rates or premium rate quotes). We will collect portal plan information for publication in post-July 1, 2010 releases of the Web portal. We believe that portal plan information is precise enough to provide a potential consumer with enough information to discern the relative costs and benefits of selecting a particular coverage option.

We welcome comments on the adequacy of these definitions, and, if applicable, suggestions to improve them.

B. Individual and Small Group Market Data Collection and Dissemination

In order to meet the mandate, we must collect information on individual and small group coverage from health insurance issuers and prepare the information to be presented publicly in a clear and concise fashion. We will have a two part rollout of the Web portal for 2010, and then annual and periodic updates to allow for the inclusion of updated data as well as consumer education content.

1. Data Submission Mandate

The Secretary currently regulates health insurance industry practices for private insurance plans offered through public programs such as Medicare, Medicaid, and CHIP. While she either has or has access to data on Federal government sponsored plans, we must issue regulations to mandate the production of the necessary information from issuers in order to fulfill the statutory mandate as it applies to private plans not offered through Federal government programs. To facilitate the development of a robust Web portal with comprehensive pricing and benefit information on individual and small group coverage, our current plan is to contract with a vendor that has a health insurance pricing engine and a related Web site with portal plan identification and comparison functionality through a full and open competition. The work on this contract will not be completed in time for the July 1, 2010 release of the Web portal. Accordingly, we will collect an initial set of data (health insurance product information) from issuers in order to present basic information on all issuers and health insurance products in the July 1, 2010 release of the Web portal. This release of the Web portal will only contain the basic information on issuers and their products in the individual and small group markets that was practicable to obtain in the constrained timeframe for meeting the statutory requirement that the Web portal be available for public use by July 1, 2010. We will provide a second release of the Web portal on October 1, 2010 with comprehensive pricing and benefit information for individual and small group coverage.

We will communicate to consumers through the Web portal and other public communication processes, such as presentations and reports to stakeholders, the names of those issuers who fail to timely meet the reporting requirements or who provide incomplete or inaccurate information.

a. July 1, 2010

To meet the July 1, 2010 deadline, we will require issuers to provide data that we will use to develop introductory information for consumers on the universe of issuers and health insurance products in their geographic area. By May 21, 2010 we will require issuers to submit corporate and contact information, such as corporate addresses and Web sites; administrative information, such as enrollment codes; enrollment data by product; product names and types, such as Preferred Provider Organization (PPO) or Health Maintenance Organization (HMO); whether enrollment is currently open for each product; geographic availability information, such as product availability by zip code or county; customer service phone numbers; Web site links to the issuer Web site, brochure documents such as benefit summaries, and provider networks; and financial ratings, such as those offered by financial rating firms including AM Best, Standard and Poor, and Moody's, if available.

We invite comment on whether enrollment information is considered by issuers to be confidential business information.

We are aware that some issuers are rated on their financial status and other performance measures. We considered excluding issuers with no or low financial ratings from firms such as AM Best, Standard and Poor, and Moody. However, it is our understanding that not all issuers seek financial ratings, and that the private firms that conduct them do not use standardized approaches. Therefore, we will instead require each issuer to submit information on whether they obtained a financial rating, from which firm, and what the rating is. We will use this information to help analyze whether such ratings are or could be useful in conveying meaningful differences to consumers. For the same purpose we will allow, but not require issuers to report other types of ratings they have received, such as ratings from The National Committee for Quality Assurance (NCQA) Accreditation.

Certain administrative information that we are collecting, such as an issuer's technical contact information (that is, the person who will work directly with us and our contractors to submit and validate data), tax identification number, and enrollment count in an issuer's products, will be used to support the structure of the database in which this information will be warehoused so that the data can be easily retrieved to support uploading information to the Web portal test site, and so that issuers and their portal plans can be reliably recognized by HHS and issuers and counted to support analyses for improving the Web portal. This information will also be used to support analysis necessary to improve the meaningfulness and usefulness of the Web portal in future releases. In addition, certain contact information will allow the Federal government and its contractors to provide useful updates

and reminders to issuers and to provide technical support.

Data submitted under the requirements contained in this regulation must be submitted by issuers in accordance with instructions issued by the Secretary.

b. October 1, 2010

We will release a more comprehensive version of the Web portal on October 1, 2010. This version will include benefit and pricing information. Benefit and pricing information includes data such as premiums, cost-sharing options, types of services covered, coverage limitations, and exclusions.

We note that for States in which premiums are not community rated, the premium data that we intend to collect will include manual rates that represent only standard risks. As a result of medical underwriting, issuers may charge individuals rates that are above the manual rate based on the applicant's health status. We recognize that there is not a feasible method for collecting or displaying information on the rate that an individual who is underwritten might actually be charged, and in the absence of that are proposing to provide information on the manual rates with the understanding that they do not represent actual premium rates that an individual may be charged.

While the initial release of the Web portal will list all issuers and all health insurance products, we believe that it would confuse users if we were to display portal plans that are not open for enrollment. Furthermore, we believe that it is inappropriate to impose a pricing and benefits information reporting burden on issuers for products and portal plans that are not open for enrollment. Therefore, we will exempt issuers of products and portal plans that are not open to new enrollments from additional pricing and benefits reporting requirements. Such issuers will be required to provide the data defined under the May 21 collection to assure we have the universe of issuers and their health insurance products.

In the event that an issuer establishes new products or new portal plans under a product, or opens enrollment in products or portal plans under a product that was previously closed to enrollment, we will require the submission of the pricing and benefits information within 30 days of offering new, or newly re-opened to enrollment, products or portal plans.

We considered excluding issuers with minimal market share from the benefits and cost sharing data collection. However, we believe that some of the portal plans offered by these issuers serve niche markets that would be particularly appealing to some consumers. At this time, we will include portal plans with minimal market share, but we will collect enrollment data for use in analyzing the effect, if any, of market share and our ability to meet consumer needs.

The intent of the Web portal is to present consumers with the full range of meaningful insurance options available to them. We believe this will be best accomplished through providing all plans that have a non-de minimus portion of the issuer's enrollment in an area and allowing for additional plans to be submitted based on the issuers perception of need. Our initial overview of the market indicates that most areas have coverage which is concentrated in a limited number of portal plans. One percent of an issuers' enrollment in the service area was seen as a reasonable cut off balancing the consumer's right to know with the burden imposed on issuers. Therefore, for each zip code, issuers will be required to submit information on at least all portal plans that are open for enrollment and that represent 1 percent or more of the issuer's total enrollment for the respective individual or small group market within that zip code.

We invite comments from the public on what information should be required from issuers to ensure consumer access to meaningful information about coverage options is included in the Web portal, and on the ways that information should be presented to allow for sorting and comparing portal plans. We are particularly interested in comments from consumers, to make certain that the Web portal meets the needs of those individuals who will use it as part of their health coverage decision making.

The data submissions for the October 1, 2010 Web portal release will be due by September 3, 2010. Data must be submitted by issuers in accordance with instructions issued by the Secretary.

c. Future Updates

After the initial data collection efforts described in the prior two subsections, we will require issuers to perform an annual verification and update of the data they submitted. In addition, we recognize that many issuers update pricing and benefit information for their portal plans more frequently than annually, and we therefore will require issuers to submit updated data whenever they change premiums, cost-sharing, types of services covered, coverage limitations, or exclusions for one or more of their individual or small group portal plans. Furthermore, we will require issuers that develop new health insurance products between annual verifications to submit pricing and benefit information for the new product within 30 days of opening enrollment.

Finally, while not included in the statutory list of minimum requirements for the Web portal, we will collect from issuers and report on the Web portal in 2011 the following performance ratings: percent of individual market and small group market policies that are rescinded; the percent of individual market policies sold at the manual rate; the percent of claims that are denied under individual market and small group market policies; and the number and disposition of appeals on denials to insure, pay claims and provide required preauthorizations.

Updated data, including the required data updates previously discussed and annual verifications, must be submitted by issuers in accordance with instructions issued by the Secretary in a future Paperwork Reduction Act Package.

d. Data Validation

All data that is collected for the July 1, 2010, October 1, 2010, and future releases of the Web portal will be validated by the issuers to assure the information they provided is correct. We will require the issuer's CEO or CFO to electronically certify to the completeness and accuracy of the initial data collection for the October 1, 2010 release of the Web portal and for any future updates to these requirements. Following the submission of the data, we will provide issuers with access to preview the data that we will publish on the Web portal. They will also be provided with access to edit their data submissions to update or correct information.

2. Voluntary Data Submission by States

We are requesting that States submit data on issuer corporate and contact information for licensed issuers in their State, such as corporate addresses and Web sites; underwriting status, such as whether or not premium rates in the individual market are determined based on medical underwriting or community rating; and information on any public Web sites administered by the State that provide consumer guidance on individual and small group health insurance coverage in their State.

It is our understanding that States possess the issuer corporate and contact information we are requesting them to submit as a result of their filing requirements for regulated issuers. We are requesting that States voluntarily

submit issuer corporate and contact information because we believe that it is incumbent upon us to ensure that we provide information on the entire universe of issuers and health insurance products. Gathering these data from both States and issuers will help us in determining the universe and ensure that we are not inadvertently excluding an issuer or product as a result of incomplete data collection.

The underwriting information and Web site links we are requesting from States will be included on the Web portal in an effort to develop consumer education content and incorporate (by way of linking) any State-developed information on insurance coverage options in a given State. We recognize that some States may have already developed Web portals that provide comprehensive information about health insurance coverage in their State, and we will link to that information if it is available.

In asking States to provide the data identified above, we note that the information would improve the accuracy and scope of the information we can provide to consumers in each of the States. We expect that States will want to ensure full access to information about issuers, health insurance products and portal plans to their residents. We believe that doing so would support consumer choice and a more robust marketplace for insurance. We therefore anticipate that States will be responsive to this request because the information requested will enhance the ability of the citizens of each State to identify affordable options for insurance.

3. Data Dissemination

We will disseminate the information collected as a result of our data submission mandates as described above, as well as other information about health insurance coverage in the individual and small group market that may be useful to the public.

a. July 1, 2010

On July 1, 2010 the Web portal will include information on the data collected as a result of the May 21, 2010 data submission mandate outlined above, including information for consumers on the issuers that sell individual and small group products in their area and links to benefit information for those products. In addition, we will provide some consumer education information on the individual market, including describing how it operates and why its offerings might be appropriate for a consumer, as well as information that will facilitate health insurance coverage decision-making and increased understanding of how the Web portal operates in the context of the Affordable Care Act. We also will include information for small businesses on the small group market, including information on the reinsurance and tax credit programs discussed previously.

b. October 1, 2010

On October 1, 2010 the Web portal will include expanded content that will incorporate the data collected as a result of the September 3, 2010 data submission mandate outlined above with the data collected for the May 21, 2010 mandate previously discussed. Using the pricing and benefit information gathered as a result of the September 3rd collection, we will display portal plans as packages of benefits and cost sharing, with associated premiums, based on geographic availability.

The display of portal plans will be driven by interactive functionality that accounts for geographic and personal demographic information such as State and zip code of residence, sex, family composition, smoking status and other health indicators. We intend for the order and layering of search results to be based on consumer choice parameters such as range of premium, high and low deductibles, ranges of out-of-pocket maximums, provider network, and indicators of market interest in the product including enrollment. We intend that consumers will also have the ability to select on all available issuers and portal plans and view them alphabetically.

We invite comments on the sort and selection functionality of the Web portal, and on the order and layering of portal plans that we will display.

Certain administrative data collected for the October 1 Web portal release will not be displayed directly on the Web portal but these data are important to the functionality of a pricing engine, such as input data that defines the geographic and demographic variables that affect premium price and cost sharing that will be displayed on the Web portal.

We also will retain and enhance the consumer education content established for the July 1, 2010 Web portal release.

c. Future Updates

We will update the portal plan pricing and benefit information as frequently as monthly to reflect updates that issuers submit as a result of changes to their portal plans. As discussed previously, because issuers may update pricing and benefit information more frequently than annually, we are requiring updated data submissions whenever an issuer changes the premiums, cost-sharing, types of services covered, coverage limitations, or exclusions for one or more of their individual or small group portal plans. Our monthly updates will also reflect these updates. Consumer education content will be updated periodically in the event that new and pertinent information about either of these markets becomes available that would be beneficial for a consumer to know.

In addition, we are required by section 1103(b)(1) to provide information on the percentage of total premium revenue expended on nonclinical costs, as reported under section 2718(a) of the Public Health Service Act (PHSA). We will report medical loss ratios to meet this requirement, which will provide more than the minimally required information and is believed to be more useful to the public. Section 2718 of the PHSA requires issuers to report this information to HHS beginning with plan years starting on or after September 23, 2010, and the Secretary is promulgating rules on these reporting requirements. After the regulations for this provision are implemented, we anticipate including medical loss ratio information on the Web portal.

As discussed previously, we anticipate including portal plan performance rating information, such as percent of individual market and small group market policies that are rescinded, the percent of individual market policies sold at the manual rate, the percent of claims that are denied under individual market and small group market policies, and the number and disposition of appeals, on the Web portal in the future.

We also anticipate posting information derived from standards and reporting obligations that will apply to insurance sold under the exchanges. For example, we might post information on issuers' financial stability, trends in enrollment and disenrollment, appeals and grievances, and other indicators of fiscal viability, customer service and policy-holder satisfaction.

The Affordable Care Act directs the Secretary to develop quality measures and standards to inform the public about quality of care and to drive improvements in the service delivery system. When such measures and standards become available they will be incorporated into the Web portal.

We invite comments on the content of futures updates to the Web portal, including the frequency of updates, the inclusion of performance rating

information, and the incorporation of quality measures and standards.

C. Information to be Collected and Disseminated on High Risk Pool Coverage

Sections 1103(a)(2)(D) and (E) of the Affordable Care Act requires HHS to include information about State health benefits high risk pools and high risk pools established under section 1101 of the Affordable Care Act. In order to fulfill this mandate, HHS must establish a mechanism for collecting and preparing this information for public dissemination in a clear and concise fashion.

1. Data Submission Request

Pursuant to the requirement that the Web portal include information on coverage through these high risk pools, this rule requests that certain information on State health benefits high risk pools and high risk pools that will operate under authority established in section 1101 of the Affordable Care Act be reported.

a. July 1, 2010

We will ask the National Association of State Comprehensive Health Insurance Plans (NASCHIP) for information about State health benefit high risk pools. This information will include administrative and contact information, such as a customer service phone number and a Web site for pool information; pool eligibility information, such as state residency and health condition requirements; pool coverage limitations, such as restrictive riders; and pool premium information, such as rules and restrictions for premium subsidy programs. We understand that this information is currently collected and maintained by NASCHIP, and that all of the existing State health benefits high risk pools are members of NASCHIP. As such, we believe that NASCHIP is strategically equipped to work with the State health benefits high risk pools to gather and transmit data to HHS on behalf of State health benefits high risk pools. Therefore, we will ask NASCHIP to provide the data as discussed above by May 21, 2010.

b. Future Updates

We understand that coverage that is offered by State health benefits high risk pools is updated on an annual calendar-year basis. We will therefore ask NASCHIP to provide annual updates of the information that we will request for the May 21, 2010 data collection. If NASCHIP is unable to provide this information in the future, we will ask State health benefits high risk pools to provide this information.

Because the initial release of the Web portal is July 1, 2010, which is in the middle of a calendar-year, we will initiate the annual update data submission requests in the fall of 2010.

In addition, we request that any State health benefits high risk pool that is established after May 21, 2010, including any high risk pool established pursuant to section 1101 of the Affordable Care Act, report the requested information within 30 days of when the pool begins accepting enrollment, and then annually thereafter.

2. Data Dissemination

a. July 1, 2010

The July 1, 2010 release of the Web portal will include eligibility, coverage limitations and premium information as collected under the request as described above, as well as consumer education content that would aid consumer understanding about high risk pools generally, and whether such pools might offer a potential source of coverage for them.

b. Future Updates

Future updates to the high risk pool content of the Web portal will include updates to the eligibility, coverage, and premium information requested above. These updates may include data for new high risk pools that are established subsequent to the July 1, 2010 release of the Web portal, including those established pursuant to section 1101 of the Affordable Care Act. We understand NASCHIP intends to build a Web site to contain detailed information that today is only available in NASCHIP's hard copy annual report. We will therefore also provide a link to a NASCHIP Web site in a future release in order to provide even more comprehensive information on those State health benefits high risk pools that are represented by NASCHIP.

D. Information to be Disseminated on Medicaid and CHIP

Sections 1103(a)(2)(B) and (C) of the Affordable Care Act require that Medicaid and CHIP information be included on the Web portal. Title XIX of the Social Security Act, the law governing the Medicaid program, has allowed States broad discretion over Medicaid eligibility policy and therefore, Medicaid eligibility varies widely across States. In general, Medicaid eligibility is dependent on categorical and income requirements. Title XXI of the Social Security Act outlines the eligibility rules in CHIP, and such eligibility requirements are generally based on certain income requirements for children under age 19. There are instances where pregnant women and parents can be eligible for CHIP. The Affordable Care Act simplifies Medicaid and CHIP income eligibility rules for most populations beginning January 2014. In the meantime, individuals will need to directly contact their State programs for definitive determinations of their eligibility or for their family members. However, the Web portal can serve as a resource to educate potential beneficiaries that they or their family members may be eligible for Medicaid and CHIP and provide information about how they can contact their State programs to determine eligibility and services available to them. The portal will serve as a resource for understanding what their State Medicaid and CHIP programs generally cover and how to apply for benefits.

To implement sections 1103(a)(2)(B) and (C) we will provide information guiding consumers on general eligibility criteria for the individual State programs in an effort to assist them in assessing the need to pursue the application processes for these programs. There are no new reporting requirements to support implementation of this section. The data will come from existing Federal sources. The Web portal will also be designed to offer links to the various State Medicaid and CHIP agencies in order to facilitate consumers' submission of program applications.

For each eligibility category, the Web portal will present information regarding the services that are available to eligible applicants. General cost sharing requirements will also be presented on the Web portal, to the extent that they are permitted for the eligibility category in these programs.

In order to provide this information, data are being compiled within CMS across all Medicaid and CHIP eligibility categories regarding the services available under each program. This includes both mandatory and optional Medicaid services for which States receive Federal funding as defined in each State Medicaid plan and any waiver of such plan, as well as the services available under each State's CHIP plan and any waiver of such plan. Mandatory services are specific services States are required to cover for certain groups of Medicaid beneficiaries, both adults and children under the age of 21. Each required service is defined in Federal regulations 42 CFR part 440. Optional Medicaid services are defined as those services not required by Federal

law that States may elect to provide Medicaid beneficiaries. Optional services are also defined in Federal regulation at 42 CFR part 440. CHIP regulations define mandatory and optional services at 42 CFR part 457.

The portal will include data elements for mandatory services for each mandatory and optional categorical group defined in each Medicaid State plan, such as: Inpatient hospital care (excluding inpatient services in institutions for mental disease for working age adults); outpatient hospital care; physician's services; nurse midwife services; pediatric and family nurse practitioner services; laboratories and x-ray services; rural health clinic services including Federally qualified health centers ("FQHC") and if permitted by State law, rural health clinic and other ambulatory services provided by a rural health clinic which are otherwise included under a State Medicaid plan; prenatal care and family planning services, skilled nursing facility services for persons over age 21, home health care services for persons over 21 who are eligible for skilled nursing services (includes medical supplies and equipment), early and periodic screening, diagnosis, and treatment for persons under age 21 ("EPSDT"), necessary transportation services, and vaccines for children.

If States include optional services in their Medicaid State plan, they must be provided in a manner that is consistent with all Federal requirements. The Web portal will include data elements to reflect the availability of optional services such as home health therapy services, rehabilitative services, case management services, medical or remedial care services or other licensed practitioners (chiropractors, podiatrists, optometrist, psychologists and nurse anesthetists), smoking cessation services and palliative care for children in each State Medicaid plan. Additional program specific service information will be provided with regard to Demonstration programs designed by States under the authority of section 1115 of the Social Security Act as well as services provided through the Children's Health Insurance Program.

Appropriate information on a specific State's Demonstration programs, including variations in eligibility, coverage and service delivery systems used under the Demonstrations, will also be provided on the portal. Demonstrations that are Statewide or high impact, meaning that they have a significant penetration in the market and serve more than a narrow coverage group, will also be included in the initial release of the Web portal. Other Demonstration programs in Medicaid and CHIP will be added in future releases.

Additionally, the Web portal will provide information to consumers on the Home and Community-Based Waiver program (Section 1915(c) of the Act), including a broad range of State defined services that enable independence in a consumer's own home.

All of the above data will be derived from sources internal to CMS and include Medicaid State Plan Amendments, CHIP State Plans, CHIP annual reports, home and community based waivers applications and renewals, 1115 Demonstration documents, and the contacts database used for *http://www.cms.gov* which includes consumer contacts to state Medicaid and CHIP program offices. We are not collecting any new data elements for the Medicaid and CHIP portions of the Web portal under the authorities that were granted to us under section 1103 of the Affordable Care Act. All information will come from data that CMS already collects for program management and administration purposes.

Certain State-based variations in Medicaid and CHIP programs, such as specific income and resource disregards, and variations in services, such as limits on the number of visits, cannot be presented with a high degree of detail in early releases of the Web portal. We expect to list the services and note that there are limitations, giving consumers enough information to ask questions of the State program if they pursue an application to enroll.

Finally, while a significant amount of data is being compiled to populate the Web portal, some of the data for the Medicaid and CHIP portion will be presented in an aggregated format to enhance public understanding. For example, eligibility categories may be collapsed together for purposes of maximizing public understanding. By way of example, there are several working disabled eligibility categories in Medicaid that inter-relate. We would expect, given the complexity of these definitions, that consumers may have difficulty fully understanding these categories. Therefore, we are presenting the public with summary-level information, such as collapsing information about the working disabled into one category.

III. Waiver of Proposed Rulemaking and the 30-Day Delay in the Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** and invite public comment on the proposed rule in accordance with 5 U.S.C. 553(b) of the Administrative Procedure Act (APA). The notice of proposed rulemaking includes a reference to the legal authority under which the rule is proposed, and the terms and substances of the proposed rule or a description of the subjects and issues involved. This procedure can be waived, however, if an agency finds good cause for concluding that a notice-and-comment procedure is impracticable, unnecessary, or contrary to the public interest and incorporates a statement of the finding and its reasons in the rule issued. Section 1103(a), as amended by section 10102(b), and section 1103(b) of the Affordable Care Act provide for the establishment by July 1, 2010 of a Web portal through which a resident or small business of any State may identify affordable health insurance coverage options in that State. In order to meet this mandate, we have to collect and prepare for dissemination a broad array of data on issuers, health insurance products, and plans, including administrative and product information for the individual and small group markets; information on eligibility and coverage limits for high risk pools; and information on eligibility and services for Medicaid and CHIP. This cannot be accomplished unless issuers are made aware of the data submission requirements in short order and States, associations and high risk pools are made aware of opportunities to aide in this information dissemination effort within the established narrow timeframes. In order to allow sufficient time for data submission and validation prior to public presentation, we must be in possession of the data that is to be included on the Web portal in the July 1, 2010 release no later than May 21, 2010.

As a result of this data collection timeline, it is impracticable to issue a notice of proposed rulemaking prior to publishing a final rule that would implement these data production requirements. Therefore, we find good cause to waive notice and comment rulemaking, and we are proceeding with issuing this final rule on an interim basis. We are providing a 30-day public comment period.

In addition, we ordinarily provide a 30-day delay in the effective date of the provisions of an interim final rule. While the Administrative Procedures Act (5 U.S.C. 551 *et seq.*) generally requires the publication of a substantive rule not less than thirty days prior to its effective date, agencies may establish a shorter time frame based on good cause.

5 U.S.C. 553(d)(3). In accordance with the good cause basis explained below, these regulations are effective on May 10, 2010.

Section 1103(a) of the Affordable Care Act requires the public release of the Web portal on July 1, 2010. As shown below, a sequenced order of activities must be completed in order to meet this statutory deadline.

Data will be uploaded into the database supporting the Web portal to populate the Web portal test site, and based on observations adjustments to the actual Web site may be made. Any problems with the actual data would be adjusted as well. This is a four week iterative process that continues until the test site is functioning and presenting data output as expected, which begins with the first data upload on June 3 and ends with the release of the Web portal on July 1.

Prior to this, the data that is submitted must be formatted in preparation for upload to the database that supports the Web portal test site. First upload to the test site takes approximately two days, from June 1 to June 3. There can be subsequent uploads through June 14, as noted below.

Prior to this, beginning May 21, we must have time to view the submitted data to assure it is complete and clean. At this same time we believe that the regulated parties should be offered an opportunity to validate the data they submit and resubmit any erroneous data. We believe that the minimum time required to accomplish such work is three weeks, which brings us to June 14, 2010. There is a 10 day overlap between this process and the two processes described above.

Prior to this, we must afford those submitting the data with adequate time to gather and submit the data. We believe that the minimum time that should be provided for this work is 7 business days from May 12 through to May 21, 2010.

In order to submit that data, these parties will need to establish accounts that will allow secure data entry into the data collection tool. This will entail approximately 3 business days from May 10 to May 12.

Furthermore, we anticipate that these parties will need training and guidance on gathering data, obtaining an account and entering data. This will include a webinar on or about May 7 and other technical support through a help desk. This collection of activities would take at least 4 business days which brings us to May 12, 2010.

Thus, in order to meet the statutory deadline of July 1, 2010, the processes described above must commence no later than May 10, 2010.

Furthermore, certain activities had to occur within the agency prior to our being able to publish a rule to implement the Web portal requirements, or enter the contracts necessary to support work under this rule. The Affordable Care Act was enacted on March 23, 2010. We immediately established a workgroup to analyze policy options and the contractual and regulatory needs of the Web portal program. This work was completed on April 22. We then commenced task-specific workgroups to draft the necessary documents, including this regulation, and to procure the initial contractors. While these activities would usually take at least 6 months we have accomplished them in just under six weeks. It was impossible to have accomplished this work any faster, and the brief timeframe between the publication of this document and the effective date of its provisions could not have been avoided through more diligent use of time by the individuals working to implement this mandate.

To afford a full thirty days between publication and the effective date we would be have to hold the parties submitting the data and ourselves to inadequate timeframes in which to accomplish the necessary tasks. The timeframes and dates described above therefore establish good cause for an effective date that is fewer than thirty days after publication.

We will accept comments on the content of this regulation until June 4, 2010. This schedule will allow for a ten day comment period prior to the initial reporting requirement under these regulations.

IV. Collection of Information Requirements

In accordance with section 3507(j) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection included in this interim rule have been submitted for emergency approval to the Office of Management and Budget (OMB). OMB has assigned control number 0938–1086 to the information collection requirements.

Under the Paperwork Reduction Act of 1995, we are required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluate whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that we solicit comment on the following issues:

- The need for the information collection and its usefulness in carrying out the proper functions of our agency.
- The accuracy of our estimate of the information collection burden.
- The quality, utility, and clarity of the information to be collected.
- Recommendations to minimize the information collection burden on the affected public, including automated collection techniques.

We are soliciting public comment on each of these issues for the following sections of this document that contain information collection requirements (ICRs):

ICRs Regarding Data Submission for the Individual and Small Group Markets (§ 159.120)

Section 159.120(a) requires health insurance issuers (issuers), in accordance with guidance issued by the Secretary, to submit corporate and contact information; administrative information; enrollment data by health insurance product; health insurance product name and type; whether enrollment is currently open for each health insurance product; geographic availability information; customer service phone numbers; and Web site links to the issuer Web site, brochure documents, and provider networks; and financial ratings on or before May 21, 2010, and annually thereafter. The information must be submitted via a template furnished by the Secretary. The burden associated with these reporting requirements is both the time and effort necessary to review the regulations, analyze data, and train issuer staff and the time and effort necessary for an issuer to compile the necessary information, to download and complete the template, and to submit the required information. We estimate that this requirement affects 650 issuers. We believe it will take each issuer 30 hours to review the regulations, analyze data, and train its staff on how to comply with the requirements. The total one-time burden associated with this requirement is 19,500 hours. The estimated cost associated with complying with this part of the requirement is $1,950,000.

Based on our experience with Medicare Part C, we also estimate that each issuer will submit information on 9 of its portal plans and that it will take each issuer a total of 19 minutes to download the information submission template, complete the template, and submit the template. The estimated annual burden associated with the requirements in § 159.120 is 206 hours.

The estimate cost associated with complying with these requirements is $13,390.

Section 159.120(b) requires issuers, in accordance with the guidance issued by the Secretary, to submit pricing and benefit data for their portal plans on or before September 3, 2010, and annually thereafter. The information must be submitted via a template furnished by the Secretary. The burden associated with this requirement is the time and effort necessary for issuers to compile and submit pricing and benefit information. We estimate that it will take each of the 650 issuers 533 minutes to comply with these requirements. The total annual burden associated with these requirements is 51,968 hours. The estimated cost associated with complying with these requirements is $3,377,920.

Section 159.120(c) requires issuers to submit updated pricing and benefit data for their portal plans whenever they change premiums, cost-sharing, types of services covered, coverage limitations, or exclusions for one or more of their individual or small group portal plans. Section 159.120(d) requires issuers to submit pricing and benefit data for portal plans associated with products that are newly open or reopened for enrollment within 30 days of opening for enrollment. Each submission would include a certification on the completeness and accuracy of the submission. The burden associated with these requirements is the time and effort necessary for an issuer to submit the aforementioned data. While these requirements are subject to the PRA, we do not have sufficient data to estimate the associated burden. We do not know the frequency with which issuers will make the aforementioned updates. For that reason, we are estimating a total burden of 1 hour for these requirements. The estimate of one hour acknowledges that there is a burden associated with this requirement. The total estimated annual burden to industry associated with these updates is 13,000 hours, or 20 hours per issuer. This estimate is based on a three times a year, 19 minute per batch response update. The total cost associated with this requirement is $845,000.

Section 159.120(e) requires issuers to annually verify the data submitted under § 159.120(a) through (d). Section 159.120(f) requires issuers to submit administrative data on product and performance rating information for future releases of the Web portal in accordance with guidance issued by the Secretary. While these requirements are subject to the PRA, we will seek OMB approval at a later date under notice and comment periods separate from this interim final rule with comment.

TABLE 1—RECORDKEEPING AND REPORTING BURDEN

Regulation section(s)	OMB control No.	Respondents	Responses	Burden per response (hours)	Total annual burden (hours)	Hourly labor cost of reporting ($)	Total labor cost of reporting ($)	Total capital/maintenance costs ($)	Total cost ($)
§ 159.120(a)	0938–1086	650	650	30	19,500	100	1,950,000	0	1,950,000
		650	650	.317	206	65	13,390	0	13,390
§ 159.120(b)	0938–1086	650	650	4	52,000	65	3,380,000		3,380,000
§ 159.120(c) and (d)	0938–1086	650	13,000	1	13,000	65	845,000	0	845,000
Total		650	14,950		84,706				6,188,390

This interim final rule imposes information collection requirements as outlined in the regulation text and specified above. However, this interim final rule also makes reference to several associated information collections that are not discussed in the regulation text contained in this document. The following is a discussion of these information collections.

State Data Submissions

As previously stated in Section II.B.2 of the preamble of this interim final rule, we are requesting that States, in accordance with guidance issued by the Secretary, submit issuer corporate and contact information, underwriting status, and information on any State-administered Web sites that provide consumer information on health insurance coverage in their State by May 21, 2010. The information must be submitted via a template furnished by the Secretary.

The burden associated with these voluntary reporting requests is both the time and effort necessary to review the regulations, analyze data, and train issuer staff and the time and effort necessary for an issuer to compile the necessary information, to download and complete the template, and to submit the required information. We estimate that this request affects all 50 States and the District of Columbia. We believe it will take each State 10 hours to review the preamble discussion, analyze data, and train its staff on how to comply with the request. The total one-time burden associated with this request is 500 hours. The total estimated cost associated with complying with this part of the requirement is $50,000.

We further estimate that it will take each State a total of 10 minutes to download the information submission template, complete the template, and submit the template. The estimated annual burden associated with this request is 8 hours. The estimated cost associated with complying with this request is $520.

Data Submissions for High Risk Pools

As discussed in section II.C.1 of the preamble of this interim final rule, we are asking the National Association of State Comprehensive Health Insurance Plans (NASCHIP) to provide data pertaining to the information listed in section II.C.1., in accordance with guidance issued by the Secretary, no later than May 21, 2010. In the event that NSACHIP is unable to provide this information, State health benefits high risk pools have been asked to submit it to HHS. While this request is subject to the PRA, we anticipate that this information will be collected from NASCHIP. Therefore, we are not assigning any burden to these entities within the first year of this collection.

In section II.C.1, we also request that NASCHIP or State health benefits high risk pools submit annual updates on the aforementioned information. While these requests are subject to the PRA, we will seek OMB approval at a later date under notice and comment periods separate from this interim final rule with comment.

Similarly, in the case of a high risk pool established under section 1101 of the Affordable Care Act, we are requesting that the pool submit to HHS the aforementioned information within thirty days of accepting enrollment and then annually thereafter. While these requests are subject to the PRA, we will seek OMB approval at a later date under notice and comment periods separate

from this interim final rule with comment.

All of the information collection requirements contained in this interim final rule were submitted to the Office of Management and Budget (OMB) for emergency review and approval as part of a single information collection request (ICR). As part of the emergency review and approval process, OMB waived the notification requirements. The ICR was approved under OMB control number 0938–1086 with an expiration date of October 31, 2010. However, we are still seeking public comments on the information collection requirements discussed in this interim final rule with comment. All comments will be considered as we continue to develop the ICR as we must resubmit the ICR to obtain a standard 3-year approval.

If you comment on these information collection and recordkeeping requirements, please do either of the following:

1. Submit your comments electronically as specified in the **ADDRESSES** section of this rule; or

2. Submit your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget,

Attention: CMS Desk Officer, DHHS–9997–IFC.

Fax: (202) 395–6974; or *E-mail: OIRA_submission@omb.eop.gov.*

V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

VI. Regulatory Impact Statement

We have examined the impacts of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 1102(b) of the Social Security Act, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), Executive Order 13132 on Federalism, and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). As discussed below, we have concluded that this rule does not have economic impacts of $100 million or more or otherwise meet the definitions of "significant rule" under EO 12866.

Based primarily on data that we have obtained from the National Association of Insurance Commissioners (NAIC), we believe that there are about 650 insurance firms that sell insurance in the individual and small group markets and are hence subject to this interim final rule. This estimate is consistent with other data on the size of the health insurance industry estimated by HHS in previous rulemakings. In addition, about 50 States and other governmental entities will be encouraged to provide voluntarily administrative data on Medicaid and CHIP and (as applicable) data on high risk pool programs. We estimate that on average these approximately 700 respondents will spend 40 hours of time reading this rule, determining what information sources will be used to respond, determining how to provide that information in the newly required formats, and completing a certification on the completeness and accuracy of the information. Assuming that high level staff (for example, managers, attorneys, actuaries, and senior IT professionals) are involved in these efforts, at an average compensation cost of $100 an hour, total one-time costs will be approximately $3 million dollars. Actual provision of data we estimate to cost approximately $3 million a year both in the first year and annually thereafter. Federal government planning, oversight, preparation, and maintenance of the portal web site we estimate to cost $11 million in one-time costs in 2010, and $12 million to oversee and operate in 2011 and annually thereafter. In total, we estimate costs in calendar 2010 to be approximately $17 million, and annual costs thereafter to be approximately $15 million. Additional detail on these estimates can be found in the Paperwork Reduction Act section of this preamble and we welcome comment on them.

All or virtually all of the information needed for the Web portal is standard information that is already made available to individuals, insurance agents, or existing IT contractors with pricing engines and other entities that sell or otherwise provide health insurance to individuals and small groups. For example, information on deductibles, coverage, cost-sharing, and catastrophic protection limits is routinely available on all or virtually all insurance available to individuals or small groups. Nothing in this rule requires preparation of entirely new information. In essence, we simply require that relatively comprehensive information be provided in standardized formats so that plan comparisons can be automated in ways that present comparable information in comparable levels of detail to facilitate consumer understanding of available choices. We believe that carriers that offer large numbers of plans will find that once they have determined how best to provide the data for a few of those plans, adding additional plans will involve very little if any additional cost. We have also limited the number of plans on which carriers will be required to provide data. Because we appreciate that the time schedule provided in the statute is extremely short, and because the Federal government itself needs time to prepare and populate its Web portal, we have provided for two data submissions in 2010, the first in May and a second more detailed collection in September. This will provide the Federal government with the time needed to competitively bid for a contractor that has a sophisticated pricing engine, as well as for issuers and States time to plan for and compile some of the more detailed information that we are deferring until later in the year.

Nothing in this interim final rule prevents other parties from aggregating and presenting similar information. For example, the State of Massachusetts already presents essentially the entire set of information we will obtain, and more, on its Connector Web site. Several online firms aggregate and present information for some of the policies sold in all or most States. Many insurance brokers and agents, and some consumer organizations, present information on subsets of plans available to their client target groups in their geographic areas. In fact, the Web portal we will provide may facilitate such efforts and improve the scope and accuracy of information provided by alternative sources.

As specified in the statute, our Web portal will include the range of insurance coverage options available to individuals or small businesses, including both public (for example, Medicaid, CHIP, and high risk pool) and private plans, and all types of plans including health maintenance organization, preferred provider organization and indemnity plans. To the best of our knowledge no web sites include such a broad range of health

care coverage and specific plan information on a national scale, with the intent of serving such a broad range of consumers needing health insurance coverage. (There are, however, similarly broad portals for some specific population groups, such as Medicare beneficiaries and Federal employees).

It is difficult if not impossible to quantify the benefits of such a broad expansion of consumer information. Moreover, the benefits of this information will change over time, most importantly as State-specific insurance exchanges expand their presence. We do believe, however, that the benefits of improved information will facilitate informed consumer choices as well as benefit the insurance market more broadly. We expect that our Web portal will inform State decisions on the design of exchanges both by positive example and, doubtless, through ideas on ways to improve on the information and formats and tools we provide. Among the likely effects of this effort will be increased use of State high risk insurance pools, increased sale of private policies to uninsured individuals, increased enrollment in Medicaid and CHIP, and commensurate reductions in spending on care for the uninsured. We believe, however, that the most important effect of the Web portal will be to improve health insurance coverage choices. For example, private plans that offer better benefit packages at lower premium costs are likely to benefit from improved consumer information.

We have considered a range of alternatives to the Web portal approach we describe in this final rule with comment, including both more and less ambitious efforts. For example, we could provide less complete information on health insurance coverage choices, and rely on States and private efforts to provide more complete comparisons. In our view, however, costs would not be significantly less were we to require less plan-specific information. Moreover, the full range of information we specify is likely to facilitate other efforts. For example, we do not believe that any other service has been able to assemble in one source information on all insurance issuers and programs serving the individual and small group markets across a broad range of States. One specific alternative on which we request comment is on our proposal to limit the number of plan variations on which we present information for an issuer in a particular area to those that represent at least one percent of their total enrollment in that area (that is, never more than 100 variations, and usually far fewer). Without such a limitation, if a particular issuer offers twenty or more possible products and twenty alternative cost sharing arrangements applied to the products in a particular geographic area, the combinations and permutations of offerings would be 400 for this one issuer alone. Our use of zip codes for plan service areas is an essential simplifying approach to reducing the number of alternative plans presented, by eliminating irrelevant plans, but does not solve this problem.

We welcome comments on the likely costs and benefits of this rule as presented, on alternatives that would improve the consumer and small business purchaser information to be provided, and on our quantitative estimates of burden. Comments are welcome to address both regulatory changes and changes that might be made through administrative decisions in planning and implementing the Web portal. Comments on ways to design our Internet portal to best meet consumer information needs are especially welcome.

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small government jurisdictions. Small businesses are those with sizes below thresholds established by the Small Business Administration (SBA). We examined the health insurance industry in depth in the Regulatory Impact Analysis we prepared for the proposed rule on establishment of the Medicare Advantage program (69 FR 46866, August 3, 2004). In that analysis we determined that there were few if any insurance firms underwriting comprehensive health insurance policies (in contrast, for example, to travel insurance policies or dental discount policies) that fell below the size thresholds for "small" business established by the SBA. In fact, then and even more so now, the market for health insurance is dominated by a relative handful of firms with substantial market shares. For example, nationally the approximately 40 Blue Cross and Blue Shield companies account for approximately half of all private insurance sold in the United States. A recent GAO study focused on the small business market and found that the five largest issuers in the small group market, when combined, represented three-quarters or more of the market in 34 of 39 States for which this information was available (GAO, February 27, 2009, *Private Health Insurance: 2008 Survey Results on Number and Market Share of Issuers in the Small Group Health Insurance Market*). These firms included Blue Cross companies, and also other major insurers such as United HealthCare, Aetna, and Kaiser. Small government jurisdictions do not sell insurance in the individual or small business markets. There are, however, a number of health maintenance organizations (HMOs) that are small entities by virtue of their non-profit status, including Kaiser, even though few if any of them are small by SBA size standards. There are approximately one hundred such HMOs. These HMOs and those Blue Cross and Blue Shield plans that are non-profit organizations, like the other firms affected by this interim final rule, will be required to provide information on their insurance policies to the Department. Accordingly, this interim final rule will affect a "substantial number" of small entities.

We estimate, however, that the one-time costs of this interim final rule are approximately $5 thousand per covered entity (regardless of size or non-profit status) and about $5 thousand annually both in the first year and thereafter. Numbers of this magnitude do not remotely approach the amounts necessary to be a "significant economic impact" on firms with revenues of tens of millions of dollars (usually hundreds of millions or billions of dollars annually). Moreover, the Regulatory Flexibility Act only requires an analysis for those final rules for which a Notice of Proposed Rule Making was required. Accordingly, we have determined, and certify, that this rule will not have a significant economic impact on a substantial number of small entities and that a regulatory flexibility analysis is not required.

In addition, section 1102(b) of the Social Security Act requires us to prepare a regulatory impact analysis if a rule may have a significant economic impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 604 of the RFA. This interim final rule would not affect small rural hospitals. Therefore, the Secretary has determined that this rule would not have a significant impact on the operations of a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1195 requires that agencies assess anticipated costs and benefits before issuing any rule that includes a Federal mandate that could result in expenditure in any one year by State, local or tribal governments, in the aggregate, or by the private sector, of

$100 million in 1995 dollars, updated annually for inflation. That threshold level is currently about $135 million. This interim final rule contains reporting mandates for private sector firms, but these will not cost more than the approximately $6 million that we have estimated. It includes no mandates on State, local, or tribal governments.

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule and subsequent final rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This interim final rule does not impose substantial direct requirement costs on State and local governments, preempt State law, or otherwise have Federalism implications.

In accordance with the provisions of Executive Order 12866, this interim final rule was reviewed by the Office of Management and Budget.

List of Subjects in 45 CFR Part 159

Administrative practice and procedure, Computer technology, Health care, Health facilities, Health insurance, Health records, Hospitals, Medicaid, Medicare, Penalties, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Department of Health and Human Services amends 45 CFR subtitle A, subchapter B, by adding a new part 159 to read as follows:

PART 159—HEALTH CARE REFORM INSURANCE WEB PORTAL

Sec.
159.100 Basis and Scope.
159.110 Definitions.
159.120 Data Submission for the individual and small group markets.

Authority: Section 1103 of the Patient Protection and Affordable Care Act (Pub. L. 111–148).

§ 159.100 Basis and scope.

This part establishes provisions governing a Web portal that will provide information on health insurance coverage options in each of the 50 States and the District of Columbia. It sets forth data submission requirements for health insurance issuers. It covers the individual market and the small group market.

§ 159.110 Definitions.

For purposes of part 159, the following definitions apply unless otherwise provided:

Health Insurance Coverage: We adopt the Public Health Service Act (PHSA) definition of "health insurance coverage" found at section 2791(b)(1) of the Public Health Service Act (PHSA).

Health Insurance Issuer: We adopt the PHSA definition of "health insurance issuer" found at section 2791(b)(2) of the PHSA.

Health Insurance Product: Means a package of benefits that an issuer offers that is reported to State regulators in an insurance filing.

Individual Health Insurance Coverage: We adopt the PHSA definition of "individual health insurance coverage" found at section 2791(b)(5) of the PHSA.

Individual Market: We adopt the Affordable Care Act definition of "individual market" found at section 1304(a)(2) of the Affordable Care Act and 2791(e)(1)(A) of the PHSA.

Portal Plan: Means the discrete pairing of a package of benefits and a particular cost sharing option (not including premium rates or premium quotes).

Section 1101 High Risk Pools: We define section 1101 high risk pools as any entity described in regulations implementing section 1101 of the Affordable Care Act.

Small Employer: We adopt the Affordable Care Act definition of "small employer" found at section 1304(b)(2) and (3).

Small Group Coverage: Means health insurance coverage offered to employees of small employers in the small group market.

Small Group Market: We adopt the Affordable Care Act definition of "small group market" found at section 1304(a)(3).

State Health Benefits High Risk Pools: Means nonprofit organizations created by State law to offer comprehensive health insurance to individuals who otherwise would be unable to secure such coverage because of their health status.

§ 159.120 Data submission for the individual and small group markets.

(a) Health insurance issuers (hereinafter referred to as issuers) must, in accordance with guidance issued by the Secretary, submit corporate and contact information; administrative information; enrollment data by health insurance product; product names and types; whether enrollment is currently open for each health insurance product; geographic availability information; customer service phone numbers; and Web site links to the issuer Web site, brochure documents, and provider networks; and financial ratings on or before May 21, 2010, and annually thereafter.

(b) Issuers must, as determined by the Secretary, submit pricing and benefit information for their portal plans on or before September 3, 2010, and annually thereafter.

(c) Issuers must submit updated pricing and benefit data for their portal plans whenever they change premiums, cost-sharing, types of services covered, coverage limitations, or exclusions for one or more of their individual or small group portal plans.

(d) Issuers must submit pricing and benefit data for portal plans associated with products that are newly open or newly reopened for enrollment within 30 days of opening for enrollment.

(e) Issuers must annually verify the data submitted under paragraphs (a) through (d) of this section, and make corrections to any errors that are found.

(f) Issuers must submit administrative data on products and portal plans, and these performance ratings, percent of individual market and small group market policies that are rescinded; the percent of individual market policies sold at the manual rate; the percent of claims that are denied under individual market and small group market policies; and the number and disposition of appeals on denials to insure, pay claims and provide required preauthorizations, for future releases of the Web portal in accordance with guidance issued by the Secretary.

(g) The issuer's CEO or CFO must electronically certify to the completeness and accuracy of all data submitted for the October 1, 2010, release of the Web portal and for any future updates to these requirements.

Dated: April 29, 2010.

Jay Angoff,

Director, Office of Consumer Information and Insurance Oversight.

Dated: April 29, 2010.

Kathleen Sebelius,

Secretary.

[FR Doc. 2010–10504 Filed 4–30–10; 4:15 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 100218107–0199–01]

RIN 0648–AY60

Fisheries Off West Coast States; West Coast Salmon Fisheries; 2010 Management Measures

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule; request for comments.

SUMMARY: By this final rule, NMFS establishes fishery management measures for the 2010 ocean salmon fisheries off Washington, Oregon, and California and the 2011 salmon seasons opening earlier than May 1, 2011. Specific fishery management measures vary by fishery and by area. The measures establish fishing areas, seasons, quotas, legal gear, recreational fishing days and catch limits, possession and landing restrictions, and minimum lengths for salmon taken in the U.S. exclusive economic zone (EEZ) (3–200 NM) off Washington, Oregon, and California. The management measures are intended to prevent overfishing and to apportion the ocean harvest equitably among treaty Indian, non-treaty commercial, and recreational fisheries. The measures are also intended to allow a portion of the salmon runs to escape the ocean fisheries in order to provide for spawning escapement and to provide for inside fisheries (fisheries occurring in state internal waters).

DATES: Final rule is effective from 0001 hours Pacific Daylight Time, May 1, 2010, until the effective date of the 2011 management measures, as published in the **Federal Register**.

Comments must be received by May 20, 2010.

ADDRESSES: You may submit comments, identified by 0648–AY60, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov.*
- *Fax:* 206–526–6736 Attn: Peggy Busby, or 562–980–4047 Attn: Jennifer Isé.
- *Mail:* Barry A. Thom, Acting Regional Administrator, Northwest Region, NMFS, 7600 Sand Point Way, NE., Seattle, WA 98115–0070 or to Rod McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Boulevard, Suite 4200, Long Beach, CA 90802–4213.

Instructions: No comments will be posted for public viewing until after the comment period has closed. All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All personal identifying information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the documents cited in this document are available from Dr. Donald O. McIsaac, Executive Director, Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 200, Portland, OR 97220–1384, and are posted on the Council's Web site (*http://www.pcouncil.org*).

Send comments regarding the reporting burden estimate or any other aspect of the collection-of-information requirements in these management measures, including suggestions for reducing the burden, to one of the NMFS addresses listed above and to David Rostker, Office of Management and Budget (OMB), by e-mail at *David_Rostker@omb.eop.gov,* or by fax at (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Peggy Busby at 206–526–4323, or Jennifer Isé at 562–980–4046.

SUPPLEMENTARY INFORMATION:

Background

The ocean salmon fisheries in the EEZ off Washington, Oregon, and California are managed under a "framework" fishery management plan entitled the Pacific Coast Salmon Fishery Management Plan (Salmon FMP). Regulations at 50 CFR part 660, subpart H, provide the mechanism for making preseason and inseason adjustments to the management measures, within limits set by the Salmon FMP, by notification in the **Federal Register**.

These management measures for the 2010 and pre-May 2011 ocean salmon fisheries were recommended by the Pacific Fishery Management Council (Council) at its April 9 to 15, 2010, meeting.

Schedule Used to Establish 2010 Management Measures

The Council announced its annual preseason management process for the 2010 ocean salmon fisheries in the **Federal Register** on December 30, 2009 (74 FR 69070), and on the Council's Web site at (*http://www.pcouncil.org*). This notice announced the availability of Council documents as well as the dates and locations of Council meetings and public hearings comprising the Council's complete schedule of events for determining the annual proposed and final modifications to ocean salmon fishery management measures. The agendas for the March and April Council meetings were published in the **Federal Register** and on the Council's Web site prior to the actual meetings.

In accordance with the Salmon FMP, the Council's Salmon Technical Team (STT) and staff economist prepared a series of reports for the Council, its advisors, and the public. All four reports were posted on the Council's Web site and otherwise made available to the Council, its advisors, and the public upon their completion. The first of the reports was prepared in February when the scientific information necessary for crafting management measures for the 2010 and pre-May 2011 ocean salmon fishery first became available. The first report, "Review of 2009 Ocean Salmon Fisheries," summarizes biological and socio-economic data for the 2009 ocean salmon fisheries and assesses how well the Council's 2009 management objectives were met. The second report, "Preseason Report I Stock Abundance Analysis for 2010 Ocean Salmon Fisheries" (PRE I), provides the 2010 salmon stock abundance projections and analyzes the impacts on the stocks and Council management goals if the 2009 regulations and regulatory procedures were applied to the projected 2010 stock abundances. The completion of PRE I is the initial step in evaluating the full suite of preseason options.

Following completion of the first two reports, the Council met in Sacramento, CA from March 5 to 11, 2010, to develop 2010 management options for proposal to the public. The Council proposed three options for commercial and recreational fisheries management for analysis and public comment. These options consisted of various combinations of management measures designed to protect weak stocks of coho and Chinook salmon, and to provide for ocean harvests of more abundant stocks. After the March Council meeting, the Council's STT and staff economist prepared a third report, "Preseason Report II Analysis of Proposed Regulatory Options for 2010 Ocean Salmon Fisheries," which analyzes the effects of the proposed 2010 management options.

Public hearings, sponsored by the Council, to receive testimony on the proposed options were held on March 29, 2010, in Westport, WA and Coos Bay, OR; and March 30, 2010, in Eureka, CA. The States of Washington, Oregon, and California sponsored meetings in various forums that also collected public testimony, which was then presented to the Council by each state's Council representative. The Council

also received public testimony at both the March and April meetings and received written comments at the Council office.

The Council met from April 9 to 15, 2010, in Portland, OR to adopt its final 2010 recommendations. Following the April Council meeting, the Council's STT and staff economist prepared a fourth report, "Preseason Report III Analysis of Council-Adopted Management Measures for 2010 Ocean Salmon Fisheries," which analyzes the environmental and socio-economic effects of the Council's final recommendations. After the Council took final action on the annual ocean salmon specifications in April, it published the recommended management measures in its newsletter and also posted them on the Council Web site (*http://www.pcouncil.org*).

Resource Status

Fisheries south of Cape Falcon, OR are limited primarily by the status of Sacramento River fall Chinook salmon and Sacramento River winter Chinook salmon, which is an evolutionarily significant unit (ESU) listed under the Endangered Species Act (ESA). Fisheries north of Cape Falcon are limited by Lower Columbia River Chinook salmon, and Lower Columbia River coho salmon, stocks which are both listed under the ESA, and by Thompson River coho from Canada. At the start of the preseason planning process for the 2010 management season, NMFS provided a letter to the Council, dated March 2, 2010, summarizing its ESA consultation standards for listed species as required by the Salmon FMP. Supplementary guidance regarding Sacramento River winter Chinook salmon was provided to the Council by NMFS in an additional letter dated March 24, 2010. The Council's recommended management measures comply with NMFS' ESA consultation standards and guidance for those listed salmon species which may be affected by Council fisheries. In most cases, the recommended measures are more restrictive than NMFS' ESA requirements.

The Sacramento River fall Chinook salmon stock (SRFC) is the major contributing stock to ocean Chinook salmon fisheries off Oregon and California. Chinook salmon fisheries south of Cape Falcon were largely closed in 2008 and 2009 to conserve SRFC in response to low preseason abundance forecasts. Despite the closures, SRFC failed to meet its conservation objective of 122,000–180,000 adult natural and hatchery spawners in 2007, 2008, and 2009 (87,940, 64,456, and 39,530 spawners respectively). Because the SRFC conservation objective has not been met for the last three years NMFS informed the Council in a letter dated March 2, 2010, that the stock is now considered "overfished" and rebuilding measures will be required. The preseason forecast for SRFC escapement in 2010, in the absence of fishing, is 245,500. Based on this forecast, and in light of recent declines in adult escapement and scientific uncertainty related to the 2010 forecast, the Council has recommended conservative management measures designed to achieve a SRFC spawning escapement of 180,000, the upper end of the conservation objective for this stock.

NMFS consulted under ESA section 7 regarding the effects of the 2010 fisheries on the Sacramento River winter Chinook salmon Evolutionarily Significant Unit (ESU) and has completed a Biological Opinion which includes a reasonable and prudent alternative (RPA) to avoid jeopardizing the continued existence of this ESU. The RPA includes management area specific fishing season openings and closures, and minimum size limits for both commercial and recreational fisheries. NMFS provided guidance to the Council regarding the effects of the 2010 fisheries on the Sacramento River winter Chinook salmon ESU. The Council incorporated the RPA into their recommended 2010 management measures.

NMFS consulted under ESA section 7 regarding the effects of the 2010 fisheries on the Lower Columbia River (LCR) Chinook salmon ESU and has completed a Biological Opinion concluding that the proposed 2010 fisheries are not likely to jeopardize the continued existence of LCR Chinook. NMFS provided guidance to the Council regarding the effects of the 2010 fisheries on the LCR Chinook salmon ESU. The LCR Chinook salmon ESU is comprised of a spring component, a "far-north" migrating bright component, and a component of north migrating tules. The bright and tule components both have fall run timing. The 2004 Interim Regional Recovery Plan identified twenty-one separate populations within the tule component of this ESU. Unlike the spring or bright populations of the ESU, LCR tule populations are caught in large numbers in Council fisheries, as well as fisheries to the north and in the Columbia River. Therefore this component of the ESU is the one most likely to constrain Council area fisheries. Total exploitation rate on tule populations has been reduced from 49 percent in 2006, to 42 percent in 2007, 41 percent in 2008, and then to 38 percent in 2009 and 2010.

The United States approved a new Pacific Salmon Treaty (PST) Agreement in 2008 that was negotiated and recommended by the Pacific Salmon Commission. This Agreement took effect on January 1, 2009. It includes a new Chinook salmon regime that reduces the allowable annual Chinook salmon catch by 30 percent in Canada's West Coast Vancouver Island (WCVI) troll and sport fishery and 15 percent in Alaska's Southeast Alaska all-gear fishery. Lower Columbia River tule Chinook salmon in particular will benefit from the reduction in the WCVI fishery. The United States negotiated for harvest reductions in Canadian intercepting fisheries largely to benefit the escapement of natural origin stocks. ESA-listed LCR tule and Puget Sound Chinook salmon were specifically identified to Canada as the intended beneficiaries of these reductions. NMFS indicated in its biological opinion on the PST Agreement that it intended to ensure that reductions in tule harvest secured by the new agreement would be passed through to escapement. In 2008 the total exploitation rate on LCR tule Chinook salmon was limited to a maximum of 41 percent. NMFS estimated in its biological opinion on the new PST Agreement that the catch reductions in the northern fisheries would reduce the exploitation rate on tule Chinook salmon by approximately three percentage points relative to what would have occurred under the previous Chinook salmon regime. Therefore, for 2010, Council fisheries should be managed such that the total exploitation rate in all fisheries on LCR tule Chinook salmon does not exceed 38 percent. This reduction is a further step intended to address the needs of the LCR Chinook salmon ESU and the weaker tule populations in the ESU in particular.

In 2008, NMFS conducted ESA section 7 consultation and issued a biological opinion regarding the effects of Council fisheries and fisheries in the Columbia River on LCR coho. The states of Oregon and Washington have focused on use of a harvest matrix for LCR coho, developed by Oregon, following their listing under Oregon's State ESA. Under the matrix, the allowable harvest in a given year depends on indicators of marine survival and brood year escapement. The matrix has both ocean and in-river components which can be combined to define a total exploitation rate limit for all ocean and in-river fisheries. Generally speaking, NMFS supports use of management planning tools that allow harvest to vary

depending on the year-specific circumstances. Conceptually, we think Oregon's approach is a good one. However, NMFS has taken a more conservative approach for LCR coho in recent years because of unresolved issues related to application of the matrix. NMFS will continue to apply the matrix as we have in the past, by limiting the total harvest to that allowed under the matrix for the ocean fisheries. For 2010, the harvest matrix prescribes an ocean exploitation rate of 15 percent, and a combined ocean and freshwater exploitation rate of 21.4 percent. However, under these circumstances, the 2008 biological opinion limits the overall exploitation rate to that specified in the ocean portion of the matrix. As a consequence, ocean salmon fisheries under the Council's jurisdiction in 2010, and commercial and recreational salmon fisheries in the mainstem Columbia River, including select area fisheries (e.g., Youngs Bay), must be managed subject to a total exploitation rate limit on LCR coho not to exceed 15 percent. Recommended management measures that would affect LCR coho are consistent with this requirement.

The ESA listing status of Oregon Coast (OC) coho has changed over the years. On February 11, 2008, NMFS again listed OC coho as threatened under the ESA (73 FR 7816 February 11, 2008). Regardless of their listing status, the Council has managed OC coho consistent with the terms of Amendment 13 of the Salmon FMP and subsequent guidance provided by the 2000 ad hoc Work Group appointed by the Council. NMFS concluded that the management provisions for OC coho would not jeopardize the continued existence of the ESU through its section 7 consultation on Amendment 13 in 1999, and has since supported use of the expert advice provided by the Council's ad hoc Work Group. For the 2010 season, the applicable spawner status and marine survival index are both in the "low" category. Under this circumstance, the Work Group report requires that the exploitation rate be limited to no more than 15 percent. Recommended management measures that would affect OC coho are consistent with this requirement.

Interior Fraser (Thompson River) coho, a Canadian stock, continues to be depressed, remaining in the "low" status category under the PST and, along with LCR coho, is the coho stock most limiting the 2010 ocean fisheries north of Cape Falcon. The recommended management measures satisfy the maximum 10.0 percent total U.S. exploitation rate called for by the PST agreements and the Salmon FMP, with a marine exploitation rate of 9.8 percent in U.S. fisheries.

Management Measures for 2010 Fisheries

The Council-recommended ocean harvest levels and management measures for the 2010 fisheries are designed to apportion the burden of protecting the weak stocks identified and discussed in PRE I equitably among ocean fisheries and to allow maximum harvest of natural and hatchery runs surplus to inside fishery and spawning needs. NMFS finds the Council's recommendations responsive to the goals of the Salmon FMP, the requirements of the resource, and the socioeconomic factors affecting resource users. The recommendations are consistent with the requirements of the Magnuson-Stevens Fishery Conservation and Management Act and U.S. obligations to Indian tribes with federally recognized fishing rights, and U.S. international obligations regarding Pacific salmon. Accordingly, NMFS has adopted them.

Reflective of preseason stock abundance forecasts, north of Cape Falcon the 2010 management measures have a significantly higher Chinook salmon quota and a substantially lower coho quota relative to the 2009 season. The total allowable catch for 2010 is 172,000 Chinook and 120,500 marked hatchery coho. These fisheries are restricted to protect threatened Lower Columbia River Chinook, threatened Lower Columbia River coho, threatened Oregon Coastal Natural coho, and coho salmon from the Thompson River in Canada. Washington coastal and Puget Sound Chinook generally migrate to the far north and are not significantly affected by ocean harvests from Cape Falcon, OR, to the U.S.-Canada border. Nevertheless, ocean fisheries in combination with fisheries inside Puget Sound are also restricted in order to meet ESA-related conservation objectives for Puget Sound Chinook. North of Cape Alava, WA, the Council recommended a provision prohibiting retention of chum salmon during August and September to protect ESA listed Hood Canal summer chum. The Council has recommended such a prohibition for the last nine years.

South of Cape Falcon, OR, the commercial salmon fishery will be limited to a 30,375-fish quota of Chinook salmon primarily between Horse Mountain and Point Arena, California. There will be no commercial salmon fishery on coho south of Cape Falcon in 2010 due to greatly reduced abundance forecast for Oregon Production Index (OPI) coho as compared with 2009. Recreational fisheries south of Cape Falcon will have a quota of 26,000 marked hatchery coho, a greatly reduced fishery off Oregon compared to 2009. Recreational fisheries for Chinook salmon south of Cape Falcon, Oregon to Horse Mountain, California will be open May 29 through September 6; south of Horse Mountain to the U.S./Mexico border the 2010 recreational season will begin May 1.

The treaty-Indian commercial troll fishery quota is 55,000 Chinook salmon in ocean management areas and Washington State Statistical Area 4B combined. This quota is higher than the 39,000 Chinook salmon quota in 2009. The fisheries include a Chinook-directed fishery in May and June with a quota of 27,500 Chinook salmon, and an all-salmon season beginning July 1 with a 27,500 Chinook salmon sub-quota. The coho quota for the treaty-Indian troll fishery in ocean management areas, including Washington State Statistical Area 4B, for the July–September period is 27,500 coho, a substantial decrease from the 60,000 coho quota in 2009.

Management Measures for 2011 Fisheries

The timing of the March and April Council meetings makes it impracticable for the Council to recommend fishing seasons that begin before May 1 of the same year. Therefore, the 2011 fishing seasons opening earlier than May 1 are also established in this action. The Council recommended, and NMFS concurs, that the commercial season off Oregon from Cape Falcon to Humbug Mountain, from Humbug Mountain to the Oregon/California border and the recreational season off Oregon from Cape Falcon to Humbug Mountain will open in 2011 as indicated in the Season Description section. At the March 2011 meeting, the Council may consider inseason recommendations to adjust the commercial season prior to May 1 in the areas off Oregon and the recreational season off Oregon and California.

Inseason Actions

The following sections set out the management regime for the salmon fishery. Open seasons and days are described in Sections 1, 2, and 3 of the 2010 management measures. Inseason closures in the commercial and recreational fisheries are announced on the NMFS hotline and through the U.S. Coast Guard Notice to Mariners as described in Section 6. Other inseason adjustments to management measures are also announced on the hotline and through the Notice to Mariners. Inseason actions will also be published

in the **Federal Register** as soon as practicable.

The following are the management measures recommended by the Council and approved and implemented here for 2010 and, as specified, for 2011.

Section 1. Commercial Management Measures for 2010 Ocean Salmon Fisheries

Note: This section contains restrictions in parts A, B, and C that must be followed for lawful participation in the fishery. Each fishing area identified in part A specifies the fishing area by geographic boundaries from north to south, the open seasons for the area, the salmon species allowed to be caught during the seasons, and any other special restrictions effective in the area. Part B specifies minimum size limits. Part C specifies special requirements, definitions, restrictions and exceptions.

A. Season Description

North of Cape Falcon, OR

—U.S./Canada Border to Cape Falcon

May 1 through the earlier of June 30 or 42,000 Chinook quota. Seven days per week (C.1). All salmon except coho (C.7). Cape Flattery, Mandatory Yelloweye Rockfish Conservation Area, and Columbia Control Zones closed (C.5). See gear restrictions and definitions (C.2, C.3). When it is projected that 35,000 Chinook have been landed, NMFS will consider inseason action to modify the open period and add landing and possession limits to extend the fishery through the end of June.

July 1 through earlier of September 14 or 14,000 Chinook preseason quota (C.8) or a landed catch quota of 11,800 marked coho (C.8.d). Open July 1–6, then Friday through Tuesday through July 27, then Saturday through Tuesday thereafter. Landing and possession limit of 150 Chinook and 50 coho per vessel per open period north of Leadbetter Point or 150 Chinook and 50 coho south of Leadbetter Point (C.1). All Salmon except no chum retention north of Cape Alava, Washington in August and September (C.7). All coho must be marked with a healed adipose fin clip(C.8.d). See gear restrictions and definitions (C.2, C.3). Cape Flattery, Mandatory Yelloweye Rockfish Conservation Area, and Columbia Control Zones closed (C.5).

Oregon State regulations require that fishers south of Cape Falcon, OR intending to fish within this area notify Oregon Department of Fish and Wildlife (ODFW) before transiting the Cape Falcon, OR line (45°46′00″ N. lat.) at the following number: 541–867–0300 Ext. 271. Vessels must land and deliver their fish within 24 hours of any closure of this fishery. Under state law, vessels must report their catch on a state fish receiving ticket. Vessels fishing or in possession of salmon while fishing north of Leadbetter Point must land and deliver their fish within the area and north of Leadbetter Point. Vessels fishing or in possession of salmon while fishing south of Leadbetter Point must land and deliver their fish within the area and south of Leadbetter Point, except that Oregon permitted vessels may also land their fish in Garibaldi, Oregon. Oregon State regulations require all fishers landing salmon into Oregon from any fishery between Leadbetter Point, Washington and Cape Falcon, Oregon must notify ODFW within one hour of delivery or prior to transport away from the port of landing by calling 541–867–0300 Ext. 271. Notification shall include vessel name and number, number of salmon by species, port of landing and location of delivery, and estimated time of delivery. Inseason actions may modify harvest guidelines in later fisheries to achieve or prevent exceeding the overall allowable troll harvest impacts (C.8).

South of Cape Falcon, OR

—Cape Falcon to Humbug Mountain

May 1–July 6, July 9–13, 16–20, 23–27, August 1–25 (C.9). All salmon except coho (C.7). All vessels fishing in the area must land their fish in the State of Oregon. See gear restrictions and definitions (C.2, C.3) and Oregon State regulations for a description of special regulations at the mouth of Tillamook Bay.

September 1–30. Sufficient impacts to conduct an experimental genetic stock identification study. All salmon must be released in good condition after collection of biological samples.

In 2011, the season will open March 15 for all salmon except coho. This opening could be modified following Council review at its March 2011 meeting.

—Humbug Mountain to Oregon/California Border

May 1–31;

July 1 through earlier of July 31, or a 1,500 Chinook quota;

Aug. 1 through earlier of Aug. 31, or a 1,500 Chinook quota (C.9).

All salmon except coho (C.7). Chinook 28 inch total length minimum size limit (B). Prior to June 1, landing and possession limit of 100 Chinook per vessel per calendar week; all vessels fishing in the area must land their fish in the area or Port Orford. July 1 through August 31, landing and possession limit of 30 Chinook per vessel per day and 90 Chinook per vessel per calendar week; all vessels fishing in this area must land and deliver all fish within this area or Port Orford, within 24 hours of any closure in this fishery, and prior to fishing outside of this area. Oregon State regulations require all fishers landing salmon from any quota managed season within this area to notify ODFW within 1 hour of delivery or prior to transport away from the port of landing by calling (541) 867–0300 ext. 252. Notification shall include vessel name and number, number of salmon by species, port of landing and location of delivery, and estimated time of delivery. See gear restrictions and definitions (C.2, C.3).

June 1–30; September 1–30. Sufficient impacts to conduct an experimental genetic stock identification study. All salmon must be released in good condition after collection of biological samples.

In 2011, the season will open March 15 for all salmon except coho, with a 28 inch Chinook minimum size limit. This opening could be modified following Council review at its March 2011 meeting.

—Oregon/California Border to Humboldt South Jetty (California KMZ)

Closed except for sufficient impacts to conduct an experimental genetic stock identification study May 1 through September 30. All salmon must be released in good condition after collection of biological samples.

—Humboldt South Jetty to Horse Mt.

Closed.

—Horse Mt. to Point Arena (Fort Bragg)

July 1–4, 8–11; July 15 through the earlier of July 29 or an 18,000 Chinook quota.

August 1 through the earlier of August 31 or a 9,375 Chinook preseason quota (C.8, C.9).

All salmon except coho (C.7). Chinook minimum size limit of 27 inches total length (B). All vessels fishing in the area must land their fish in the area when the fishery is managed under a quota; all fish must be offloaded within 24 hours of any closure of the fishery (C1). See gear restrictions and definitions (C.2, C.3).

May 1 through June 30; September 1–30. Sufficient impacts to conduct an experimental genetic stock identification study. All salmon must be released in good condition after collection of biological samples.

—Pt. Arena to U.S./Mexico Border

July 1–4, 8–11 (C.9). All salmon except coho (C.7). Chinook minimum

size limit of 27 inches total length (B). See gear restrictions and definitions (C.2, C.3).

May 1 through June 30; July 13 through September 30. Sufficient impacts to conduct an experimental genetic stock identification study. All salmon must be released in good condition after collection of biological samples.

B. Minimum Size (Inches) (See C.1)

Area (when open)	Chinook		Coho		Pink
	Total length	Head-off	Total length	Head-off	
North of Cape Falcon, OR	28.0	21.5	16.0	12.0	None.
Cape Falcon to Horse Mt.	28.0	21.5	.....	.....	None.
Horse Mt. to US-Mexico Border	27.0	20.5	.....	.....	None.

Metric equivalents: 28.0 in = 71.1 cm, 27.0 in = 68.6 cm, 21.5 in = 54.6 cm, 20.5 in = 52.1 cm, 16.0 in = 40.6 cm, and 12.0 in = 30.5 cm.

C. Special Requirements, Definitions, Restrictions, or Exceptions

C.1. Compliance With Minimum Size or Other Special Restrictions

All salmon on board a vessel must meet the minimum size, landing/possession limit, or other special requirements for the area being fished and the area in which they are landed if the area is open. Salmon may be landed in an area that has been closed more than 96 hours only if they meet the minimum size, landing/possession limit, or other special requirements for the area in which they were caught. Salmon may be landed in an area that has been closed less than 96 hours only if they meet the minimum size, landing/possession limit, or other special requirements for the areas in which they were caught and landed.

States may require fish landing/receiving tickets to be kept on board the vessel for 90 days after landing to account for all previous salmon landings.

C.2. Gear Restrictions

a. Salmon may be taken only by hook and line using single point, single shank, barbless hooks.

b. Cape Falcon, Oregon, to the OR/CA border: No more than 4 spreads are allowed per line.

c. OR/CA border to U.S./Mexico border: No more than 6 lines are allowed per vessel, and barbless circle hooks are required when fishing with bait by any means other than trolling.

C.3. Gear Definitions

Trolling defined: Fishing from a boat or floating device that is making way by means of a source of power, other than drifting by means of the prevailing water current or weather conditions.

Troll fishing gear defined: One or more lines that drag hooks behind a moving fishing vessel. In that portion of the fishery management area (FMA) off Oregon and Washington, the line or lines must be affixed to the vessel and must not be intentionally disengaged from the vessel at any time during the fishing operation.

Spread defined: A single leader connected to an individual lure or bait.

Circle hook defined: A hook with a generally circular shape and a point which turns inward, pointing directly to the shank at a 90°angle.

C.4. Transit Through Closed Areas With Salmon on Board

It is unlawful for a vessel to have troll or recreational gear in the water while transiting any area closed to fishing for a certain species of salmon, while possessing that species of salmon; however, fishing for species other than salmon is not prohibited if the area is open for such species, and no salmon are in possession.

C.5. Control Zone Definitions

a. Cape Flattery Control Zone—The area from Cape Flattery (48°23′00′ N. lat.) to the northern boundary of the U.S. EEZ; and the area from Cape Flattery south to Cape Alava (48°10′00″ N. lat.) and east of 125°05′00″ W. long.

b. Mandatory Yelloweye Rockfish Conservation Area—The area in Washington Marine Catch Area 3 from 48°00.00′ N. lat.; 125°14.00′ W. long. to 48°02.00′ N. lat.; 125°14.00′ W. long. to 48°02.00′ N. lat.; 125°16.50′ W. long. to 48°00.00′ N. lat.; 125°16.50′ W. long. and connecting back to 48°00.00′ N. lat.; 125°14.00′ W. long.

c. Columbia Control Zone—An area at the Columbia River mouth, bounded on the west by a line running northeast/southwest between the red lighted Buoy #4 (46°13′35″ N. lat., 124°06′50″ W. long.) and the green lighted Buoy #7 (46°15′09Pprime; N. lat., 124°06′16″ W. long.); on the east, by the Buoy #10 line which bears north/south at 357° true from the south jetty at 46°14′00″ N. lat.,124°03′07″ W. long. to its intersection with the north jetty; on the north, by a line running northeast/southwest between the green lighted Buoy #7 to the tip of the north jetty (46°15′48″ N. lat., 124°05′20″ W. long.), and then along the north jetty to the point of intersection with the Buoy #10 line; and, on the south, by a line running northeast/southwest between the red lighted Buoy #4 and tip of the south jetty (46°14′03″ N. lat., 124°04′05″ W. long.), and then along the south jetty to the point of intersection with the Buoy #10 line.

d. Bandon High Spot Control Zone—The area west of a line between 43°07′00″ N. lat.; 124°37′00″ W. long. and 42°40′30″ N. lat; 124°52′0″ W. long. extending to the western edge of the exclusive economic zone (EEZ).

e. Klamath Control Zone—The ocean area at the Klamath River mouth bounded on the north by 41°38′48″ N. lat. (approximately six nautical miles north of the Klamath River mouth); on the west, by 124°23′00″ W. long. (approximately 12 nautical miles off shore); and on the south, by 41°26′48″ N. lat. (approximately six nautical miles south of the Klamath River mouth).

C.6. Notification When Unsafe Conditions Prevent Compliance With Regulations

If prevented by unsafe weather conditions or mechanical problems from meeting special management area landing restrictions, vessels must notify the U.S. Coast Guard and receive acknowledgment of such notification prior to leaving the area. This notification shall include the name of the vessel, port where delivery will be made, approximate amount of salmon (by species) on board, and the estimated time of arrival.

C.7. Incidental Halibut Harvest

During authorized periods, the operator of a vessel that has been issued an incidental halibut harvest license may retain Pacific halibut caught incidentally in Area 2A while trolling for salmon. Halibut retained must be no less than 32 inches (81.28 cm) in total length, measured from the tip of the lower jaw with the mouth closed to the extreme end of the middle of the tail, and must be landed with the head on. License applications for incidental

harvest must be obtained from the International Pacific Halibut Commission (IPHC) (phone: 206–634–1838). Applicants must apply prior to April 1 of each year. Incidental harvest is authorized only during May and June troll seasons and after June 30 if quota remains and if announced on the NMFS hotline (phone: 800–662–9825). ODFW and Washington Department of Fish and Wildlife (WDFW) will monitor landings. If the landings are projected to exceed the 25,035 pound preseason allocation or the total Area 2A non-Indian commercial halibut allocation, NMFS will take inseason action to prohibit retention of halibut in the non-Indian salmon troll fishery.

Beginning May 1, IPHC license holders may possess or land no more than one Pacific halibut per each three Chinook, except one Pacific halibut may be possessed or landed without meeting the ratio requirement, and no more than 35 halibut may be possessed or landed per trip. Pacific halibut retained must be no less than 32 inches in total length (with head on).

NMFS and the Council request salmon trollers voluntarily avoid a "C-shaped" yelloweye rockfish conservation area in order to protect yelloweye rockfish. The area is defined in the Pacific Council Halibut Catch Sharing Plan in the North Coast subarea (Washington marine area 3), with the following coordinates in the order listed:

48°18′ N. lat.; 125°18′ W. long.;
48°18′ N. lat.; 124°59′ W. long.;
48°11′ N. lat.; 124°59′ W. long.;
48°11′ N. lat.; 125°11′ W. long.;
48°04′ N. lat.; 125°11′ W. long.;
48°04′ N. lat.; 124°59′ W. long.;
48°00′ N. lat.; 124°59′ W. long.;
48°00′ N. lat.; 125°18′ W. long.;

and connecting back to 48°18′ N. lat.; 125°18′ W. long.

C.8. Inseason Management

In addition to standard inseason actions or modifications already noted under the season description, the following inseason guidance is provided to NMFS:

a. Chinook remaining from the May through June non-Indian commercial troll harvest guideline north of Cape Falcon may be transferred to the July through September harvest guideline on a fishery impact equivalent basis.

b. NMFS may transfer fish between the recreational and commercial fisheries north of Cape Falcon on a fishery impact equivalent basis if there is agreement among the areas' representatives on the Salmon Advisory Subpanel (SAS).

c. At the March 2011 meeting, the Council will consider inseason recommendations for special regulations for any experimental fisheries (proposals must meet Council protocol and be received in November 2010).

d. If retention of unmarked coho is permitted by inseason action, the allowable coho quota will be adjusted to ensure preseason projected mortality of critical stocks is not exceeded.

e. Landing limits may be modified inseason to sustain season length and keep harvest within overall quotas.

f. Chinook remaining from the Horse Mt. to Point Arena commercial troll quota in July may be transferred to the August preseason quota on a fishery impact equivalent basis.

C.9. State Waters Fisheries

Consistent with Council management objectives:

a. The State of Oregon may establish additional late-season fisheries in state waters.

b. The State of California may establish limited fisheries in selected state waters.

Check state regulations for details.

C.10. For the purposes of California Department of Fish and Game (CDFG) Code, Section 8232.5, the definition of the Klamath Management Zone (KMZ) for the ocean salmon season shall be that area from Humbug Mt., Oregon, to Horse Mt., California.

Section 2. Recreational Management Measures for 2010 Ocean Salmon Fisheries

Note: This section contains restrictions in parts A, B, and C that must be followed for lawful participation in the fishery. Each fishing area identified in part A specifies the fishing area by geographic boundaries from north to south, the open seasons for the area, the salmon species allowed to be caught during the seasons, and any other special restrictions effective in the area. Part B specifies minimum size limits. Part C specifies special requirements, definitions, restrictions and exceptions.

A. Season Description

North of Cape Falcon, OR

—U.S./Canada Border to Cape Falcon

June 12 through earlier of June 30 or a marked Chinook quota of 12,000 (C.5). Seven days per week. Two fish per day, all salmon except coho, all Chinook must be marked with a healed adipose fin clip (C.1). No later than June 23, NMFS will consider inseason action to change bag limits. Chinook 24-inch total length minimum size limit (B). See gear restrictions (C.2). Inseason management may be used to sustain season length and keep harvest within the overall Chinook recreational TAC for north of Cape Falcon (C.5).

—U.S./Canada Border to Cape Alava (Neah Bay)

July 1 through earlier of September 19 or 6,990 marked coho subarea quota with a subarea guideline of 5,400 Chinook (C.5). Tuesday through Saturday. All salmon except no chum beginning August 1. Two fish per day, only one of which can be a Chinook; no later than July 14, NMFS will consider inseason action to remove the one Chinook bag limit restriction. All retained coho must be marked (C.1). See gear restrictions and definitions (C.2, C.3). Inseason management may be used to sustain season length and keep harvest within the overall Chinook recreational TAC for north of Cape Falcon (C.5).

—Cape Alava to Queets River (La Push Subarea)

July 1 through earlier of September 19 or 1,700 marked coho subarea quota with a subarea guideline of 2,450 Chinook (C.5).

September 25 through earlier of October 10 or 50 marked coho quota or 50 Chinook quota (C.5) in the area north of 47°50′00 N. lat. and south of 48°00′00″ N. lat. Tuesday through Saturday through September 19, seven days per week beginning September 25. All salmon, two fish per day, only one of which can be a Chinook; no later than July 14, NMFS will consider inseason action to remove the one Chinook bag limit restriction. All retained coho must be marked (C.1). See gear restrictions and definitions (C.2, C.3). Inseason management may be used to sustain season length and keep harvest within the overall Chinook recreational TAC for north of Cape Falcon (C.5).

—Queets River to Leadbetter Point (Westport Subarea)

July 4 through earlier of September 19 or 24,860 marked coho subarea quota with a subarea guideline of 28,000 Chinook (C.5). Sunday through Thursday. All salmon, two fish per day, only one of which can be a Chinook; no later than July 14, NMFS will consider inseason action to remove the one Chinook bag limit restriction. All retained coho must be marked (C.1). See gear restrictions and definitions (C.2, C.3). Grays Harbor Zone closed beginning August 1 (C.4.b). Inseason management may be used to sustain season length and keep harvest within the overall Chinook recreational TAC for north of Cape Falcon (C.5).

—Leadbetter Point to Cape Falcon (Columbia River Subarea)

July 1 through earlier of September 30 or 33,600 marked coho subarea quota with a subarea guideline of 13,100 Chinook (C.5). Seven days per week. All salmon, two fish per day, only one of which can be a Chinook; no later than July 14, NMFS will consider inseason action to remove the one Chinook bag limit restriction. All retained coho must be marked (C.1). See gear restrictions and definitions (C.2, C.3). Columbia Control Zone closed (C.4.c). Inseason management may be used to sustain season length and keep harvest within the overall Chinook recreational TAC for north of Cape Falcon (C.5).

South of Cape Falcon, OR

—Cape Falcon to OR/CA Border

Except as provided below during the all-salmon mark-selective coho fishery, the season will be May 29 through September 6 (C.6). Seven days per week. All salmon except coho; two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3).

All-salmon mark-selective coho fishery: June 26 through earlier of Sept. 6 or a landed catch of 26,000 marked coho. The all salmon except coho season may reopen upon attainment of the coho quota. Seven days per week, all salmon, two fish per day. All retained coho must be marked (C.1). Fishing in the Stonewall Bank groundfish conservation area restricted to trolling only on days the all depth recreational halibut fishery is open (call the NMFS halibut fishing hotline 1–800–662–9825 for specific dates) (C.3.b, C.4.d). Open days may be adjusted inseason to utilize the available quota (C.5).

In 2011, the season between Cape Falcon and Humbug Mt. will open March 15 for all salmon except coho, two fish per day (B, C.1, C.2, C.3).

—OR/CA Border to Horse Mt. (California KMZ)

May 29 through September 6 (C.6). Seven days per week. All salmon except coho; two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3). Klamath Control Zone closed in August (C.4.e). See California State regulations for additional closures adjacent to the Smith, Eel, and Klamath rivers.

—Horse Mt. to Point Arena (Fort Bragg)

April 3–30. Seven days per week. All salmon except coho; two fish per day (C.1). Chinook minimum size limit of 20 inches total length (B). See gear restrictions and definitions (C.2, C.3).

May 1 through September 6. Seven days per week. All salmon except coho; two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3).

Inseason action may be taken to open the fishery in April 2011 pending review at the March 2011 Council meeting of information on 2010 spawning escapements, 2011 abundance forecasts, annual management objectives, or other relevant issues.

—Point Arena to U.S./Mexico Border

April 3–30. Seven days per week. All salmon except coho; two fish per day (C.1). Chinook minimum size limit of 20 inches total length (B). See gear restrictions and definitions (C.2, C.3).

May 1 through September 6. Thursday through Monday. All salmon except coho; two fish per day (C.1). Chinook minimum size limit of 24 inches total length (B). See gear restrictions and definitions (C.2, C.3).

Inseason action may be taken to open the fishery in April 2011 pending review at the March 2011 Council meeting of information on 2010 spawning escapements, 2011 abundance forecasts, annual management objectives, or other relevant issues.

B. Minimum Size (Total Length in Inches) (See C.1)

Area (when open)	Chinook	Coho	Pink
North of Cape Falcon	24.0	16.0	None.
Cape Falcon to OR/CA Border	24.0	16.0	None.
OR/CA Border to Horse Mountain	24.0	.....	24.0.
Horse Mountain to U.S./Mexico Border:			
April 3–30	20.0	.....	20.0.
May 1–September 6	24.0	.....	24.0.

Metric equivalents: 24.0 in = 61.0 cm, 20.0 in = 50.8 cm, and 16.0 in = 40.6 cm.

C. Special Requirements, Definitions, Restrictions, or Exceptions

C.1. Compliance With Minimum Size and Other Special Restrictions

All salmon on board a vessel must meet the minimum size or other special requirements for the area being fished and the area in which they are landed if that area is open. Salmon may be landed in an area that is closed only if they meet the minimum size or other special requirements for the area in which they were caught.

Ocean Boat Limits: Off the coast of Washington, Oregon, and California, each fisher aboard a vessel may continue to use angling gear until the combined daily limits of salmon for all licensed and juvenile anglers aboard has been attained (additional state restrictions may apply).

C.2. Gear Restrictions

Salmon may be taken only by hook and line using barbless hooks. All persons fishing for salmon, and all persons fishing from a boat with salmon on board, must meet the gear restrictions listed below for specific areas or seasons.

a. U.S./Canada Border to Point Conception, California: No more than one rod may be used per angler; and no more than two single point, single shank barbless hooks are required for all fishing gear. [**Note:** ODFW regulations in the state-water fishery off Tillamook Bay may allow the use of barbed hooks to be consistent with inside regulations.]

b. Horse Mt., California, to Point Conception, California: Single point, single shank, barbless circle hooks (see gear definitions below) are required when fishing with bait by any means other than trolling, and no more than two such hooks shall be used. When angling with two hooks, the distance between the hooks must not exceed five inches when measured from the top of the eye of the top hook to the inner base of the curve of the lower hook, and both hooks must be permanently tied in place (hard tied). Circle hooks are not required when artificial lures are used without bait.

C.3. Gear Definitions

a. Recreational fishing gear defined: Angling tackle consisting of a line with no more than one artificial lure or

natural bait attached. Off Oregon and Washington, the line must be attached to a rod and reel held by hand or closely attended; the rod and reel must be held by hand while playing a hooked fish. No person may use more than one rod and line while fishing off Oregon or Washington. Off California, the line must be attached to a rod and reel held by hand or closely attended. Weights directly attached to a line may not exceed four pounds (1.8 kg). While fishing off California north of Point Conception, no person fishing for salmon, and no person fishing from a boat with salmon on board, may use more than one rod and line. Fishing includes any activity which can reasonably be expected to result in the catching, taking, or harvesting of fish.

b. Trolling defined: Angling from a boat or floating device that is making way by means of a source of power, other than drifting by means of the prevailing water current or weather conditions.

c. Circle hook defined: A hook with a generally circular shape and a point which turns inward, pointing directly to the shank at a 90° angle.

C.4. Control Zone Definitions

a. The Bonilla-Tatoosh Line: A line running from the western end of Cape Flattery to Tatoosh Island Lighthouse (48°23′30″ N. lat., 124°44′12″ W. long.) to the buoy adjacent to Duntze Rock (48°28′00″ N. lat., 124°45′00″ W. long.), then in a straight line to Bonilla Point (48°35′30″ N. lat., 124°43′00″ W. long.) on Vancouver Island, British Columbia.

b. Grays Harbor Control Zone—The area defined by a line drawn from the Westport Lighthouse (46°53′18″ N. lat., 124°07′01″ W. long.) to Buoy #2 (46°52′42″ N. lat., 124°12′42″ W. long.) to Buoy #3 (46°55′00″ N. lat., 124°14′48″ W. long.) to the Grays Harbor north jetty (46° 36′00″ N. lat., 124°10′51″ W. long.).

c. Columbia Control Zone: An area at the Columbia River mouth, bounded on the west by a line running northeast/southwest between the red lighted Buoy #4 (46°13′35″ N. lat., 124°06′50″ W. long.) and the green lighted Buoy #7 (46°15′09′ N. lat., 124°06′16″ W. long.); on the east, by the Buoy #10 line which bears north/south at 357° true from the south jetty at 46°14′00″ N. lat., 124°03′07″ W. long. to its intersection with the north jetty; on the north, by a line running northeast/southwest between the green lighted Buoy #7 to the tip of the north jetty (46°15′48″ N. lat., 124°05′20″ W. long.) and then along the north jetty to the point of intersection with the Buoy #10 line; and on the south, by a line running northeast/southwest between the red lighted Buoy #4 and tip of the south jetty (46°14′03″ N. lat., 124°04′05″ W. long.), and then along the south jetty to the point of intersection with the Buoy #10 line.

d. Stonewall Bank Groundfish Conservation Area: The area defined by the following coordinates in the order listed:

44°37.46′ N. lat.; 124°24.92′ W. long.;
44°37.46′ N. lat.; 124°23.63′ W. long.;
44°28.71′ N. lat.; 124°21.80′ W. long.;
44°28.71′ N. lat.; 124°24.10′ W. long.;
44°31.42′ N. lat.; 124°25.47′ W. long.;

and connecting back to 44°37.46′ N. lat.; 124°24.92′ W. long.

e. Klamath Control Zone: The ocean area at the Klamath River mouth bounded on the north by 41°38′48″ N. lat. (approximately six nautical miles north of the Klamath River mouth); on the west, by 124°23′00″ W. long. (approximately 12 nautical miles off shore); and, on the south, by 41°26′48″ N. lat. (approximately 6 nautical miles south of the Klamath River mouth).

C.5. Inseason Management

Regulatory modifications may become necessary inseason to meet preseason management objectives such as quotas, harvest guidelines, and season duration. In addition to standard inseason actions or modifications already noted under the season description, the following inseason guidance is provided to NMFS:

a. Actions could include modifications to bag limits, or days open to fishing, and extensions or reductions in areas open to fishing.

b. Coho may be transferred inseason among recreational subareas north of Cape Falcon on a fishery impact equivalent basis to help meet the recreational season duration objectives (for each subarea) after conferring with representatives of the affected ports and the Council's SAS recreational representatives north of Cape Falcon.

c. Chinook and coho may be transferred between the recreational and commercial fisheries north of Cape Falcon on a fishery impact equivalent basis if there is agreement among the representatives of the Salmon Advisory Subpanel (SAS).

d. If retention of unmarked coho is permitted in the area from the U.S./Canada border to Cape Falcon, Oregon, by inseason action, the allowable coho quota will be adjusted to ensure preseason projected mortality of critical stocks is not exceeded.

C.6. Additional Seasons in State Territorial Waters

Consistent with Council management objectives, the States of Washington, Oregon, and California may establish limited seasons in state waters. Check state regulations for details.

Section 3. Treaty Indian Management Measures for 2010 Ocean Salmon Fisheries

Note: This section contains restrictions in parts A, B, and C which must be followed for lawful participation in the fishery.

A. Season Descriptions

U.S./Canada Border to Cape Falcon

May 1 through the earlier of June 30, or 27,500 Chinook quota. All salmon except coho. If the Chinook quota for the May-June fishery is not fully utilized, the excess fish cannot be transferred into the later all-salmon season. If the Chinook quota is exceeded, the excess will be deducted from the later all-salmon season. See size limit (B) and other restrictions (C).

July 1 through the earlier of September 15, or 27,500 preseason Chinook quota, or 41,500 coho quota. All Salmon. See size limit (B) and other restrictions (C).

B. Minimum Size (Inches)

Area (when open)	Chinook		Coho		Pink
	Total	Head-off	Total	Head-off	
North of Cape Falcon	24.0	18.0	16.0	12.0	None.

Metric equivalents: 24.0 in = 61.0 cm, 18.0 in = 45.7 cm, 16.0 in = 40.6 cm, and 12.0 in = 30.5 cm.

C. Special Requirements, Restrictions, and Exceptions

C.1. Tribal and Area Boundaries

All boundaries may be changed to include such other areas as may hereafter be authorized by a Federal court for that tribe's treaty fishery.

S'KLALLAM—Washington State Statistical Area 4B (All).

MAKAH—Washington State Statistical Area 4B and that portion of the FMA north of 48°02′15″ N. lat. (Norwegian Memorial) and east of 125°44′00″ W. long.

QUILEUTE—That portion of the FMA between 48°07′36″ N. lat. (Sand Pt.) and 47°31′42″ N. lat. (Queets River) and east of 125°44′00″ W. long.

HOH—That portion of the FMA between 47°54′18″ N. lat. (Quillayute River) and 47°21′00″ N. lat. (Quinault River) and east of 125°44′00″ W. long.

QUINAULT—That portion of the FMA between 47°40′06″ N. lat. (Destruction Island) and 46°53′18″ N. lat. (Point Chehalis) and east of 125°44′00″ W. long.

C.2. Gear Restrictions

a. Single point, single shank, barbless hooks are required in all fisheries.

b. No more than eight fixed lines per boat.

c. No more than four hand held lines per person in the Makah area fishery (Washington State Statistical Area 4B and that portion of the FMA north of 48°02′15″ N. lat. (Norwegian Memorial) and east of 125°44′00″ W. long.)

C.3. Quotas

a. The quotas include troll catches by the S'Klallam and Makah tribes in Washington State Statistical Area 4B from May 1 through September 15.

b. The Quileute Tribe will continue a ceremonial and subsistence fishery during the time frame of September 15 through October 15 in the same manner as in 2004–2009. Fish taken during this fishery are to be counted against treaty troll quotas established for the 2010 season (estimated harvest during the October ceremonial and subsistence fishery: 100 Chinook; 200 coho).

C.4. Area Closures

a. The area within a six nautical mile radius of the mouths of the Queets River (47°31′42″ N. lat.) and the Hoh River (47°45′12″ N. lat.) will be closed to commercial fishing.

b. A closure within two nautical miles of the mouth of the Quinault River (47°21′00″ N. lat.) may be enacted by the Quinault Nation and/or the State of Washington and will not adversely affect the Secretary of Commerce's management regime.

Section 4. Halibut Retention

Under the authority of the Northern Pacific Halibut Act, NMFS promulgated regulations governing the Pacific halibut fishery which appear at 50 CFR part 300, subpart E. On March 18, 2010, NMFS published a final rule (75 FR 13024) to implement the IPHC's recommendations, to announce fishery regulations for U.S. waters off Alaska and fishery regulations for treaty commercial and ceremonial and subsistence fisheries, some regulations for non-treaty commercial fisheries for U.S. waters off the West Coast, and approval of and implementation of the Area 2A Pacific halibut Catch Sharing Plan and the Area 2A management measures for 2010. The regulations and management measures provide that vessels participating in the salmon troll fishery in Area 2A (all waters off the States of Washington, Oregon, and California), which have obtained the appropriate IPHC license, may retain halibut caught incidentally during authorized periods in conformance with provisions published with the annual salmon management measures. A salmon troller may participate in the halibut incidental catch fishery during the salmon troll season or in the directed commercial fishery targeting halibut, but not both.

The following measures have been approved by the IPHC, and implemented by NMFS. During authorized periods, the operator of a vessel that has been issued an incidental halibut harvest license may retain Pacific halibut caught incidentally in Area 2A while trolling for salmon. Halibut retained must be no less than 32 inches (81.28 cm) in total length, measured from the tip of the lower jaw with the mouth closed to the extreme end of the middle of the tail, and must be landed with the head on. License applications for incidental harvest must be obtained from the International Pacific Halibut Commission (phone: 206–634–1838). Applicants must apply prior to April 1 of each year. Incidental harvest is authorized only during May and June troll seasons and after June 30 if quota remains and if announced on the NMFS hotline (phone: 800–662–9825). ODFW and WDFW will monitor landings. If the landings are projected to exceed the 25,035 pound preseason allocation or the total Area 2A non-Indian commercial halibut allocation, NMFS will take inseason action to close the incidental halibut fishery.

Beginning May 1, IPHC license holders may possess or land no more than one Pacific halibut per each three Chinook, except one Pacific halibut may be possessed or landed without meeting the ratio requirement, and no more than 35 halibut may be possessed or landed per trip. Pacific halibut retained must be no less than 32 inches in total length (with head on).

NMFS and the Council request that salmon trollers voluntarily avoid a "C-shaped" YRCA (North Coast Recreational YRCA) in order to protect yelloweye rockfish. The area is defined in the Pacific Council Halibut Catch Sharing Plan in the North Coast subarea (WA marine area 3) (*See* Section 1.C.7. for the coordinates).

Section 5. Geographical Landmarks

Wherever the words "nautical miles off shore" are used in this document, the distance is measured from the baseline from which the territorial sea is measured.

Geographical landmarks referenced in this document are at the following locations:

Cape Flattery, WA	48°23′00″ N. lat.
Cape Alava, WA	48°10′00″ N. lat.
Queets River, WA	47°31′42″ N. lat.
Leadbetter Point, WA	46°38′10″ N. lat.
Cape Falcon, OR	45°46′00″ N. lat.
Florence South Jetty, OR.	44°00′54″ N. lat.
Humbug Mountain, OR.	42°40′30″ N. lat.
Oregon-California Border.	42°00′00″ N. lat.
Humboldt South Jetty, CA.	40°45′53″ N. lat.
Horse Mountain, CA ..	40°05′00″ N. lat.
Point Arena, CA	38°57′30″ N. lat.
Point Reyes, CA	37°59′44″ N. lat.
Point San Pedro, CA ..	37°35′40″ N. lat.
Pigeon Point, CA	37°11′00″ N. lat.
Point Sur, CA	36°18′00″ N. lat.
Point Conception, CA	34°27′00″ N. lat.

Section 6. Inseason Notice Procedures

Actual notice of inseason management actions will be provided by a telephone hotline administered by the Northwest Region, NMFS, 206–526–6667 or 800–662–9825, and by U.S. Coast Guard Notice to Mariners broadcasts. These broadcasts are announced on Channel 16 VHF–FM and 2182 KHz at frequent intervals. The announcements designate the channel or frequency over which the Notice to Mariners will be immediately broadcast. Inseason actions will also be filed with the **Federal Register** as soon as practicable. Since provisions of these management measures may be altered by inseason actions, fishermen should monitor either the telephone hotline or Coast Guard broadcasts for current information for the area in which they are fishing.

Classification

This rule is necessary for conservation and management and is consistent with the Magnuson-Stevens Act.

This notification of annual management measures is exempt from review under Executive Order 12866, pursuant to guidance from the Office of Management and Budget.

The provisions of 50 CFR 660.411 state that if, for good cause, an action must be filed without affording a prior opportunity for public comment, the measures will become effective; however, public comments on the action will be received for a period of 15 days after the date of publication in the **Federal Register.** NMFS will receive public comments on this action until May 20, 2010. These regulations are being promulgated under the authority of 16 U.S.C. 1855(d) and 16 U.S.C. 773(c).

The Assistant Administrator for Fisheries, NOAA (AA) finds good cause under 5 U.S.C. 553(b)(B), to waive the requirement for prior notice and opportunity for public comment, as such procedures are impracticable and contrary to the public interest.

The annual salmon management cycle begins May 1 and continues through April 30 of the following year. May 1 was chosen because the pre-May harvests constitute a relatively small portion of the annual catch. The time-frame of the preseason process for determining the annual modifications to ocean salmon fishery management measures depends on when the pertinent biological data are available. Salmon stocks are managed to meet annual spawning escapement goals or specific exploitation rates. Achieving either of these objectives requires designing management measures that are appropriate for the ocean abundance predicted for that year. These pre-season abundance forecasts, which are derived from the previous year's observed spawning escapement, vary substantially from year to year, and are not available until January and February because spawning escapement continues through the fall.

The preseason planning and public review process associated with developing Council recommendations is initiated in February as soon as the forecast information becomes available; for this year, the forecast information became available when the Council released Preseason Report I, on February 24, 2010. The public planning process requires coordination of management actions of four states, numerous Indian tribes, and the Federal Government, all of which have management authority over the stocks. This complex process includes the affected user groups, as well as the general public. The process is compressed into a 2-month period which culminates at the April Council meeting at which the Council adopts a recommendation that is forwarded to NMFS for review, approval and implementation of fishing regulations effective on May 1.

Providing opportunity for prior notice and public comments on the Council's recommended measures through a proposed and final rulemaking process would require 30 to 60 days in addition to the two-month period required for development of the regulations. Delaying implementation of annual fishing regulations, which are based on the current stock abundance projections, for an additional 60 days, would require that fishing regulations for May and June be set in the previous year, without knowledge of current stock status. Although this is currently done for fisheries opening prior to May, relatively little harvest occurs during that period (e.g., in 2007 less than one percent of commercial and recreational harvest occurred prior to May 1). Allowing the much more substantial harvest levels normally associated with the May and June seasons to be regulated in a similar way would impair NMFS ability to protect weak stocks and ESA listed stocks, and provide harvest opportunity where appropriate. The choice of May 1 as the beginning of the regulatory season balances the need to gather and analyze the data needed to meet the management objectives of the Salmon FMP and the requirements to provide adequate public notice and comment on the regulations implemented by NMFS.

If these measures are not in place on May 1, the previous year's management measures will continue to apply in most areas. This would result in lost fishing opportunities for Chinook salmon north of Cape Falcon. In 2009 the commercial fishery north of Cape Falcon began on May 1, with specific dates open for fishing, with a 13,745 Chinook salmon quota and a landing limit of 75 Chinook salmon per vessel per period; under the 2010 management measures, this fishery begins May 1, open seven days per week, with a 42,000 Chinook salmon quota and no specified landing and possession limit until July 1. Therefore, if this regulation is not in place on May 1, fishers will lose the opportunity to fully access the available Chinook salmon in May and June, and will be unnecessarily restricted to a lower period limit. In addition, the discrepancy will cause confusion for the fishermen. Both north and south of Cape Falcon, recreational coho fisheries will be more restrictive under 2010 management measures. In 2009, the recreational fishery north of Cape Falcon had a quota of 176,400 marked coho, in 2010 that quota will be 67,200; from Cape Falcon to the Oregon/California border had a 110,000 coho quota, in 2010 the recreational coho quota will be 26,000; managing these recreational fisheries under 2009 measures would result in over harvesting available coho stocks. Recreational salmon fisheries south of the Oregon/California border were largely closed in 2009, under 2010 management measures there is the opportunity for a recreational Chinook salmon fishery opening May 1, if this regulation is not in place on May 1 fishers will lose the opportunity to fish off California.

Overall, the annual population dynamics of the various salmon stocks require managers to vary the season structure of the various West Coast area fisheries to both protect weaker stocks and give fishers access to stronger salmon stocks, particularly hatchery produced fish. Failure to implement these measures immediately could compromise the status of certain stocks, or result in foregone opportunity to harvest stocks whose abundance has increased relative to the previous year thereby undermining the purpose of this agency action. Based upon the above-described need to have these measures effective on May 1 and the fact that there is limited time available to implement these new measures after the final Council meeting in April and before the commencement of the ocean salmon fishing year on May 1, NMFS has concluded it is impracticable and contrary to the public interest to provide an opportunity for prior notice and public comment under 5 U.S.C. 553(b)(B).

The AA also finds that good cause exists under 5 U.S.C. 553(d)(3), to waive the 30-day delay in effectiveness of this final rule. As previously discussed, data are not available until February and management measures not finalized until mid-April. These measures are essential to conserve threatened and endangered ocean salmon stocks, and to provide for harvest of more abundant stocks. Failure to implement these measures immediately could compromise the ability of some stocks to attain their conservation objectives, preclude harvest opportunity, and negatively impact anticipated international, state, and tribal salmon fisheries, thereby undermining the purposes of this agency action.

To enhance notification of the fishing industry of these new measures, NMFS is announcing the new measures over the telephone hotline used for inseason management actions and is also posting the regulations on both of its West Coast regional Web sites (*http://www.nwr.noaa.gov* and *http://swr.nmfs.noaa.gov*). NMFS is also advising the States of Washington, Oregon, and California on the new management measures. These states announce the seasons for applicable state and Federal fisheries through their own public notification systems.

This action contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA), and which have been approved by the Office of Management and Budget (OMB) under control number 0648–0433. The public reporting burden for providing notifications if landing area restrictions cannot be met is estimated to average 15 minutes per response. This estimate includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by e-mail to *David_Rostker@omb.eop.gov*, or fax to 202–395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

NMFS has current ESA biological opinions that cover fishing under these regulations on all listed salmon species. NMFS reiterated their consultation standards for all ESA listed salmon and steelhead species in their annual Guidance letters to the Council dated March 2 and 24, 2010. Some of NMFS past biological opinions have found no jeopardy, and others have found jeopardy, but provided reasonable and prudent alternatives to avoid jeopardy. The management measures for 2010 are consistent with the biological opinions that found no jeopardy, and with the reasonable and prudent alternatives in the jeopardy biological opinions. NMFS consulted this year on the effects of the 2010 annual regulations on LCR Chinook salmon. NMFS concluded that the proposed 2010 fisheries are not likely to jeopardize the continued existence of LCR Chinook salmon. NMFS also consulted this year on the effects of the 2010 annual regulations on Sacramento River winter Chinook salmon. NMFS provided a reasonable and prudent alternative in its jeopardy biological opinion. The Council's recommended management measures therefore comply with NMFS' consultation standards and guidance for all listed salmon species which may be affected by Council fisheries. In most cases, the recommended measures result in impacts that are more restrictive than NMFS' ESA requirements.

This final rule does not contain policies with federalism implications under Executive Order 13132.

This final rule was developed after meaningful consultation and collaboration with the affected tribes. The tribal representative on the Council made the motion for the regulations that apply to the tribal vessels.

Authority: 16 U.S.C. 773–773k; 1801 *et seq.*

Dated: April 30, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2010–10566 Filed 4–30–10; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 75, No. 86
Wednesday, May 5, 2010

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

ELECTION ASSISTANCE COMMISSION

2 CFR Chapter 58

Nonprocurement Debarment and Suspension

AGENCY: U.S. Election Assistance Commission (EAC).

ACTION: Proposed Rulemaking.

SUMMARY: The Election Assistance Commission (EAC) invites the general public and other Federal agencies to take this opportunity to comment on proposed debarment and suspension regulations. These proposed regulations will apply to nonprocurement grants, cooperative agreements and other similar transactions. Under this system, a person who is debarred or suspended is excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities. The proposed regulations adopt the format established by the Office of Management and Budget (OMB) in a document on nonprocurement debarment and suspension published in the **Federal Register** on August 31, 2005. In today's notice EAC proposes establishing a new 2 CFR chapter 58 Part 5800 that adopts OMB's final government-wide guidance on nonprocurement debarment and suspension and contains supplemental EAC nonprocurement debarment and suspension provisions.

DATES: You must submit comments on or before 5 p.m. Eastern Standard Time on June 4, 2010.

ADDRESSES: You may submit comments on the proposed debarment and suspension regulations by any of the following methods. Please submit your comments via only one of the methods described.

- *E–Mail:* Send comments to *HAVAcomments@eac.gov* with "Comments for Debarment and Suspension" in the subject line.
- *Fax:* Send to "EAC Regulations" at (202) 566–3128. Comments sent by fax must be limited to 6 pages.
- *Mail:* Send to "EAC Regulations" at U.S. Election Assistance Commission, 1201 New York Avenue, Suite 300, Washington, DC 20005. Comments sent by mail must be unbound, be on paper no larger than 8.5" by 11"; and be submitted in duplicate. Mailed comments will not be accepted in electronic form (floppy disk, CD, etc.).
- *Hand Delivery/Courier:* Deliver to Suite 300, 1201 New York Avenue, Washington, DC 20005 between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. Comments submitted by hand delivery must be unbound, be on paper no larger than 8.5" by 11"; and be submitted in duplicate. Comments sent by courier or hand delivery will not be accepted in electronic form (floppy disk, CD, etc.).

Note: All submissions must include the agency name and regulation title (*i.e.* "Nonprocurement Debarment and Suspension") for this information and collection/recordkeeping requirement. Please also identify comments on regulatory text by subpart and section. Note that all comments received will be publicly posted, including any personal information provided. The EAC will post comments without change unless the comment contains profanity or material that is prohibited from disclosure by law.

FOR FURTHER INFORMATION CONTACT: Andrew Guggenheim or Tamar Nedzar, Election Assistance Commission, 1201 New York Avenue, Suite 300, Washington, DC 20005; Telephone: 202–566–3100.

SUPPLEMENTARY INFORMATION:

Background

On February 18, 1986, President Reagan issued Executive Order 12549, (3 CFR, 1986 Comp., 189 51 FR 6370), to establish a governmentwide debarment and suspension system covering the full range of Federal procurement and nonprocurement activities, and to establish procedures for debarment and suspension from participation in Federal nonprocurement programs. Section 6 of the Executive Order authorized OMB to issue guidelines to Executive departments and agencies that govern which program and activities are covered by the Executive Order, prescribe Governmentwide criteria and Governmentwide minimum due process procedures, and set forth other related details for the effective administration of the guidelines. Section 3 directed agencies to issue implementing regulations that are consistent with OMB guidelines. Pursuant to the Executive Order, on February 21, 1986 OMB published initial guidelines for nonprocurement debarment and suspension that applies to grants, cooperative agreements and similar transactions. Under this system, a person who is debarred or suspended is excluded from federal financial and nonfinancial assistance and benefits under federal programs and activities. Debarment or suspension of a participant in a program by one agency is registered with the GSA-maintained Excluded Parties List System and has government-wide, reciprocal effect on that participant's ability to obtain procurement and nonprocurement contracts.

After notice and comment by the public, EAC will adopt the OMB regulations found in 2 CFR part 180. To adopt these regulations, 2 CFR 180.25 requires federal agencies to address certain agency specific elements. The following regulations fulfill this requirement EAC's proposed regulations state what contracts are covered under this policy, identify the official authorized to grant exceptions to an excluded persons list, and state the person responsible for communicating requirements to both first and second tier program participants.

In general, the proposed regulation gives the authority over debarment and suspension to the Contracting Officer. In the event of a vacancy or conflict of interest by the contracting officer, the debarment and suspension official will be the Chief Financial Officer. Covered transactions include all agency nonprocurement transactions, first-tier contracts and subcontracted funded by the EAC in excess of $25,000 or 30 percent of the value of the first-tier transaction, whichever is lesser. EAC is also providing covered individuals a right to request a reconsideration of a debarment action. In this process, an individual having received a disposition of the debarment action may submit to the Contracting Officer any newly discovered material evidence; proof of a reversal of the conviction or civil judgment upon which the debarment was based; a bona fide change in ownership or management; elimination of other causes for which the debarment or suspension was imposed; or other reasons the debarring official finds

appropriate. By default, elements not addressed in the agency specific regulations will be covered by the government-wide sections in the Common Rule.

Regulatory Analysis

A. Executive Order 12866

EAC is an independent agency and is not subject to Executive Order 12866.

Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))

This regulatory action will not have a significant adverse impact on a substantial number of small entities.

Unfunded Mandates Act of 1995

This regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector of $100 million or more in any one year.

Paperwork Reduction Act of 1995

This final rule does not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

Federalism (Executive Order 13132)

This regulatory action does not have Federalism implications, as set forth in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13211

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

Congressional Review Act

The Congressional Review Act, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States.

EAC will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective 30 days from the date of publication in the **Federal Register**.

List of Subjects in 2 CFR Part 5800

Administrative practice and procedure, Debarment and suspension, Assistance programs, Reporting and recordkeeping requirements.

For the reasons set fourth in the preamble, under the authority at 2 CFR 180.30, the Election Assistance Commission proposes to amend title 2 of the Code of Federal Regulations, by establishing chapter 58, consisting of part 5800 to read as follows:

Title 2—Grants and Agreements

Chapter 58—Election Assistance Commission

PART 5800—NONPROCUREMENT DEBARMENT AND SUSPENSION

Sec.

Authority: Sec. 2455, Pub. L. 103–355, 108; Stat. 3327 (31 U.S.C. 6101 note); E.O. 12549; (3 CFR, 1986 Comp., p. 189); E.O. 12689 (3); CFR, 1989 Comp., p. 235).

§ 5800.10 What does this part do?

This part adopts the Office of Management and Budget (OMB) guidance in Subparts A through I of 2 CFR part 180, as supplemented by this part, as the U.S. Election Assistance Commission ("the Commission" or "EAC") policies and procedures for nonprocurement debarment and suspension. It thereby gives regulatory effect for the Commission to the OMB guidance as supplemented by this part. This part satisfies the requirements in section 3 of Executive Order 12549, "Debarment and Suspension" and 31 U.S.C. 6101 note.

§ 5800.20 Does this part apply to me?

This part and, through this part, pertinent portions of the OMB guidance in Subparts A through I of 2 CFR part (*see* table at 2 CFR 180.100(b)) apply to you if you are a—

(a) Participant or principal in a "covered transaction" (*see* Subpart B of 2 CFR part 180 and the definition of "nonprocurement transaction" at 2 CFR 180.970);

(b) Respondent in a Commission suspension or debarment action;

(c) Commission debarment or suspension official; or

(d) Commission grants officer, agreements officer, or other official authorized to enter into any type of nonprocurement transaction that is a covered transaction.

§ 5800.30 What policies and procedures must I follow?

The Commission policies and procedures that you must follow are the policies and procedures specified in each applicable section of the OMB guidance in Subparts A through I of 2 CFR part 180, as that section is supplemented by the section in this part with the same section number. The contracts that are covered transactions, for example, are specified by section 220 of the OMB guidance (*i.e.,* 2 CFR 180.220) as supplemented by section 220 in this part (*i.e.,* § ____.220). For any section of OMB guidance in Subparts A through I of 2 CFR 180 that has no corresponding section in this part, Commission policies and procedures are those in the OMB guidance.

Subpart A—General

§ 5800.137 Who at the Commission may grant an exception to let an excluded person participate in a covered transaction?

The Commission's Contracting Officer has the authority to grant an exception to let an excluded person participate in a covered transaction, as provided in the OMB guidance at 2 CFR 180.135.

Subpart B—Covered Transactions

§ 5800.220 What contracts and subcontracts, in addition to those listed in 2 CFR 180.220, are covered transactions?

Pursuant to 2 CFR 180.220(c), the Commission extends coverage of nonprocurement suspension and debarment requirements beyond first-tier procurement contracts to include any subcontract to be funded by the Commission, the value of which is expected to equal to or exceed $25,000 or 30% of the value of first-tier transaction, whichever is lesser.

Subpart C—Responsibilities of Participants Regarding Transactions

§ 5800.332 What methods must I use to pass requirements down to participants at lower tiers with whom I intend to do business?

If a lower-tier transaction is covered pursuant to § 5800.220, you as a participant must include a term or condition in lower-tier transactions requiring lower-tier participants to comply with Subpart C of the OMB guidance in 2 CFR part 180.

Subpart D—Responsibilities of Federal Agency Officials Regarding Transactions

§ 5800.437 What method do I use to communicate to a participant the requirements described in the OMB guidance at 2 CFR 180.435?

To communicate to a participant the requirements described in 2 CFR 180.435 of the OMB guidance, you as an agency official must include a term or condition in the transaction that requires the participant's compliance with subpart C of 2 CFR part 180, and requires the participant to include a similar term or condition in lower-tier covered transactions.

§ 5800.765 May I ask the suspending official to reconsider a decision to suspend me?

Yes. Within 30 days of receiving a final notice of suspension, you may make a written request for the suspending official to reconsider your suspension.

§ 5800.875 May I ask the debarring official to reconsider a decision to debar me?

Yes. Within 30 days of receiving a final notice of debarment, you may make a written request for the debarring official to reconsider your debarment pursuant to § 5800.880. The disposition of your request for reconsideration; or the result of your appeal; shall be considered a final agency action.

§ 5800.880 What factors may influence the debarring official during reconsideration?

The debarring official may reduce or terminate your debarment based on:

(a) Newly discovered material evidence;

(b) A reversal of the conviction or civil judgment upon which your debarment was based;

(c) A bona fide change in ownership or management;

(d) Elimination of other causes for which the debarment was imposed; or

(e) Other reasons the debarring official finds appropriate.

§ 5800.890 How may I appeal my debarment?

(a) If the Commission debarring official issues a decision under 2 CFR 180.870 to debar you after you present information in opposition to a proposed debarment under § 180.815, you may ask for review of the debarring official's decision in two ways:

(1) You may ask the debarring official under § 875 to reconsider the decision for material errors of fact or law that you believe will change the outcome of the matter; or

(2) You may request a review by the EAC's debarment appeals body (DAP), which is composed of the Executive Director, Chief Financial Officer, and Chief Operating Officer. The DAP will review your appeal and make a determination on whether to sustain or reverse the decision of the debarring official. The DAP will then make a recommendation to the EAC Commissioners who will vote by circulation on whether to accept or reject the recommendation of the DAP. A request to review the debarring official's decision to debar you must be made within 30 days of your receipt of the debarring official's decision under § 180.870 or paragraph (a)(1) of this section. However, the DAP may recommend to the EAC Commissioners that the debarring official's decision be reversed, based on a majority vote of the DAP, only where the DAP finds that the decision is based on a clear error of material fact or law, or where DAP finds that the debarring official's decision was arbitrary, capricious, or an abuse of discretion. You may appeal the debarring official's decision without requesting reconsideration, or you may appeal the decision of the debarring official on reconsideration.

(b) A request for review under this section must be in writing; prominently state on the envelope or other cover and at the top of the first page "Debarment Appeal;" state the specific findings you believe to be in error; and include the reasons or legal bases for your position. The appeal request should be delivered or addressed to the U.S. Election Assistance Commission, 1201 New York Avenue, NW., Suite 300, Washington, DC 20005.

(c) After the circulation vote of the EAC Commissioners has been certified, either the Commission debarring official or the DAP must notify you of their decision under this section, in writing, using the notice procedures set forth at §§ 180.615 and 180.975.

(e) Nothing in this part prohibits the EAC from delegating the appeal review process to another Federal agency through a memorandum of understanding or interagency agreement.

Subparts E through H—[Reserved]

Subpart I—Definitions

§ 5800.930 Debarring official.

For the Commission, the debarring official for all nonprocurement transactions is the Commission's Contracting Officer. In the case of a vacancy in the position of the Contracting Officer, the alternate debarring official is the Chief Financial Officer.

§ 5800.970 Nonprocurement transaction.

While the Commission treats all payments made to states under 42 U.S.C. 15301, 15302 and 15401 as grants, this part does not apply to grants made to states and political subdivisions therein.

§ 5800.1010 Suspending official.

For the Commission, the debarring official for all nonprocurement transactions is the Commission's Contracting Officer. In the case of a vacancy in the position of the Contracting Officer, the alternate debarring official is the Chief Financial Officer.

Subpart J—[Reserved]

Alice Miller,

Chief Operating Officer, U.S. Election Assistance Commission.

[FR Doc. 2010–10210 Filed 5–4–10; 8:45 am]

BILLING CODE 6820–KF–P

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133–AD71

Short-Term, Small Amount Loans

AGENCY: National Credit Union Administration (NCUA).

ACTION: Proposed rule.

SUMMARY: NCUA proposes to amend its general lending rule to enable federal credit unions (FCUs) to offer short-term, small amount loans (STS loans) as a viable alternative to predatory payday loans. The proposed amendment would permit FCUs to charge a higher interest rate for an STS loan than is permitted under the general lending rule, but the proposal will impose limitations on the permissible term, amount, and fees associated with an STS loan. The STS loan alternative will assist FCUs in meeting their mission to promote thrift and meet their members' credit needs, particularly the provident needs of members of modest means. Permitting a higher interest rate for STS loans will permit FCUs to make loans cost effective while the limitations on the term, amount, and fees will appropriately limit the product to meeting its purpose as an alternative to predatory credit products. This rule also identifies "best practices" FCUs should incorporate into their individual STS programs.

DATES: Comments must be received on or before July 6, 2010.

ADDRESSES: You may submit comments by any of the following methods (Please send comments by one method only):

- *NCUA Web Site: http://www.ncua.gov/news/proposed_regs/proposed_regs.html.* Follow the instructions for submitting comments.
- *E-mail:* Address to *regcomments@ncua.gov.* Include "[Your name] Comments on Notice of Proposed Rulemaking (Short-term, Small Amount Loans)" in the e-mail subject line.
- *Fax:* (703) 518–6319. Use the subject line described above for e-mail.
- *Mail:* Address to Mary Rupp, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Public inspection: All public comments are available on the agency's Web site at *http://www.ncua.gov/RegulationsOpinionsLaws/comments* as submitted, except as may not be possible for technical reasons. Public comments will not be edited to remove any identifying or contact information. Paper copies of comments may be inspected in NCUA's law library, at 1775 Duke Street, Alexandria, Virginia 22314, by appointment weekdays between 9 a.m. and 3 p.m. To make an appointment, call (703) 518–6546 or send an e-mail to *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: Justin M. Anderson, Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518–6540.

SUPPLEMENTARY INFORMATION.

A. Background

NCUA proposes to amend its general lending rule to provide a regulatory framework so FCUs can be a viable alternative to high-cost payday lenders. The term "payday loan" generally refers to a small, short-term loan that is intended, specifically, to cover a borrower's expenses until his or her next payday, when the loan is to be repaid in full. NCUA Instruction 10200, Credit Union Online Instruction Guide, page 32 (12/2009). Historically, these loans have often been made by lenders who charge high fees and sometimes engage in predatory lending practices. While some payday loan borrowers use these loans sparingly, many other borrowers find themselves in cycles where their loans "roll over" repeatedly, incurring even higher fees. These borrowers are often unable to break free of this unhealthy dependence on payday loans. The NCUA Board (the Board) believes this dependence often reflects or exacerbates other financial difficulties payday loan borrowers are experiencing. The Board believes that, under the proper regulatory framework, FCUs can offer their members a reasonable alternative to high-cost payday loans and be a source of fair credit.

The Board believes this proposed rule would achieve short and long-term benefits for current payday borrowers. In the short-term, this proposed rule would provide borrowers with a responsible alternative to high-cost payday loans; in the long-term, the Board believes this rule will permit FCUs to offer borrowers a way to break the cycle of reliance on payday loans by building credit and converting to traditional, main-stream financial products. Unlike payday lenders, which rarely report their customers' payment of loans to credit bureaus, FCUs will generally be reporting their members' payment histories with STS loans to the credit bureaus. Members who successfully pay off STS loans at FCUs will likely be able to improve their credit scores and qualify for future loans at lower costs.

NCUA's 5300 Call Report data, for the time period ending December 31, 2009, indicate that approximately 352 FCUs currently offer various types of payday loan alternatives, and approximately 605 FCUs currently offer micro loans, which are loans with a principal under $500. The products currently being offered by FCUs include a mix of open and closed-end loans. With regard to open-end products, the Board notes this proposal does not address or alter the applicable regulations governing these products and does not prohibit open-end programs that are currently permissible. In addition, this proposed rule would not prohibit an FCU from continuing or participating in a closed-end payday loan program that currently operates successfully and is legal under NCUA's regulations and the Federal Reserve Board's Regulation Z (Reg Z). 12 CFR part 226.

As evidenced by the small number of FCUs currently offering payday loan alternatives, the Board recognizes the current legal framework makes it difficult for FCUs to establish a safe and sound STS loan program for closed-end loans that satisfies the legal requirements of NCUA's regulations and the Federal Credit Union Act (the Act). For example, the Board notes some FCUs have charged high "application" fees to offset the risk of STS loans and remain under the current interest rate ceiling. These high fees, however, may be contrary to FCUs providing members with a better alternative to high-cost payday loans. Also, application fees that exceed the cost of processing the application may be deemed finance charges under Reg Z and result in an FCU violating NCUA's interest rate ceiling.

B. Legal Framework

While the Act permits FCUs to make loans and extend lines of credit to members, it prohibits FCUs from charging an annual percentage rate (APR), inclusive of all finance charges, above 15%. 12 U.S.C. 1757(5)(A)(vi). The Act, however, permits the Board, after considering certain statutory criteria, to establish a higher interest rate ceiling in 18-month cycles. *Id.* At its July 2009 meeting, the Board reapproved an APR ceiling of 18%, effective until January 2011. NCUA Letter to Federal Credit Unions 09–FCU–06 (July 2009).

NCUA's long-standing policy has been to look to the definition of "finance charge" in Reg Z to determine what fees are finance charges. The NCUA Board articulated this policy in the preamble

of a final rulemaking, and the Office of General Counsel has subsequently reiterated the policy in numerous legal opinions. 45 FR 22888, 22890 (April 4, 1980); OGC Op. 91–0412 (April 30, 1991); OGC Op. 03–1050 (November 10, 2003).

Reg Z defines "finance charge" broadly as including "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." 12 CFR 226.4(a). As a result, most fees charged in connection with an extension of credit are considered finance charges.

Reg Z, however, expressly excludes certain charges from the definition of finance charge. Relevant to this proposed rule, Reg Z excludes "[a]pplication fees charged to all applicants for credit, whether or not credit is actually extended." 12 CFR 226.4(a). The Official Staff Interpretations to Reg Z further explains:

> An application fee that is excluded from the finance charge is a charge to recover the costs associated with processing applications for credit. The fee may cover the costs of services such as credit reports, credit investigations, and appraisals. The creditor is free to impose the fee in only certain of its loan programs, such as mortgage loans, However (*sic*), if the fee is to be excluded from the finance charge under § 226.4(c)(1), it must be charged to all applicants, not just to applicants who are approved or who actually receive credit.

12 CFR part 226, supp. I, section 226.4—Finance Charge, 4(c) Charges excluded from the finance charge. Paragraph 4(c)(1).

To provide more flexibility for STS loans, the Board considered changing NCUA's long-standing policy of looking to Reg Z in defining finance charge. The Board, however, has determined that a consistent interpretation of finance charge, in line with requirements for other lenders, will be more easily understood by members and FCUs.[1] The Board, therefore, is proposing to amend NCUA's general lending rule by permitting a separate and higher interest rate ceiling for STS loans. The Board notes this proposed rule prohibits FCUs making loans using the higher interest rate ceiling from charging any fees in excess of a capped application fee and restricts the duration and amount of STS loans.

C. Proposed Changes

1. Interest Rate Ceiling

Payday lenders often charge APRs in excess of 400%. Without an increase in NCUA's allowable APR for STS loans, the Board believes it may be almost impossible for some FCUs to provide these types of loans to members. The Board believes small FCUs in particular, which often have members in need of this type of loan, would not be able to operate an STS loan program under NCUA's current interest rate ceiling in a cost-effective manner.

Historically, the Board has had one interest rate ceiling for lending, which has ranged between 15% and 21%. The Board does not believe it is necessary to raise the interest rate ceiling for all credit products. Rather, the Board's authority to establish a higher interest rate than set by the Act encompasses authority, once the statutory criteria are met, to establish different rates for different products. The Board, therefore, proposes to set a higher interest rate ceiling only for STS loans made in accordance with the proposed requirements of this rule.

The Board believes an annual percentage rate (APR) of 1000 basis points above the established general interest rate ceiling, as set by the Board, is sufficient for FCUs to offer STS loans with a reasonable return considering they are unsecured and have a high risk of loss. Based on the current interest rate ceiling, the maximum APR under this proposed rule would be 28%. This figure is lower than the maximum permissible interest rate under both the Talent Amendment, Public Law 109–364, section 670, 120 Stat. 2266 (2006) (codified at 10 U.S.C. 987), and the FDIC's Small-Dollar Loan Pilot Program Guidelines (SDLG).[2]

In determining an APR ceiling for STS loans, the Board examined data collected by the FDIC during the first year of its pilot program and determined an APR that averaged the maximum APR and the average APR offered by banks under the program was an appropriate figure for FCUs.[3] In addition to accounting for the not-for-profit nature of FCUs, a 28% APR also takes into account that the APR under both the Talent Amendment[4] and the FDIC's SDLG is inclusive of all fees, while this proposed rule permits a capped application fee in addition to the set APR. The APR ceiling in this proposed rule also considers the average usury caps and payday loan laws enacted by several states.[5]

The Board realizes that interest income alone may not be sufficient to recover losses and the costs of processing an application, and, therefore, is proposing FCUs be permitted to charge a capped application fee as discussed below. The Board, however, is requesting specific comment on the possibility of using a 36% APR inclusive of all fees, either as an alternative to or in lieu of the structure in this proposed rule. The Board notes that, although this proposed rule allows a higher APR ceiling for STS loans than for all other FCU loans, it encourages FCUs to charge only an APR that allows an STS loan program to operate in a safe and sound manner.[6]

2. Application Fees

The Board recognizes that some payday lenders charge fees, disguised as "application" fees, to account for the risk of loss associated with STS loans. Often these fees exceed $50 and are sometimes tied to the amount of the loan. As noted above, Reg Z defines an application fee as the fee necessary to recoup actual costs incurred by the lender in reviewing an application. The Board believes it is illegal under the Act and

[1] The Board notes the Fed has proposed a rule that would remove most finance charge exclusions for closed-end credit transactions secured by real property or a dwelling. The Fed's proposed rule solicited public comment on whether to expand this provision to encompass all closed-end transactions. Truth in Lending, 74 FR 43232 (August 26, 2009). The comment period closed in December of 2009, and, if the Fed amends the definition of finance charges for all closed-end transactions, the Board will consider revising the requirements of this proposal.

[2] In 2007, the FDIC implemented a voluntary pilot program to assess the viability of banks offering short-term loans. The FDIC's SDLG provided for a maximum APR of 36%, inclusive of all fees, and issued guidelines for a bank to participate in the program. Federal Deposit Insurance Company, Final Guidelines for Affordable Small-Dollar Loans, PR–52–2007 (2007).

[3] In the fourth quarter of the FDIC's pilot program, the average APR was 20% and the maximum APR was 35.5%. The average of these two figures is 27.75%. The FDIC's Small-Dollar Loan Pilot Program: A Case Study After One Year, FDIC Quarterly, Volume 3, No. 2 (2009)

[4] The Department of Defense regulations implementing the Talent Amendment permit a 36% APR inclusive all fees associated with extension of credit to a covered borrower if they are financed, deducted from the proceeds of the consumer credit, or otherwise paid as a condition of the credit. 72 FR 50592 (August 31, 2007). For additional discussion of issues regarding implementation and oversight of the regulation see Department of Defense Report to the U.S. Senate on Implementation of Limitations on Terms of Consumer Credit Extended to Service Members and Dependents (2008) at *http://www.dcuc.org/PDF%20Files/Senate%20Report%20Final.pdf.*

[5] Currently, 14 states have usury caps on small-dollar loan products, which have an average rate of 24.2%.

[6] *See* fn. 3. In the FDIC's pilot program, some participating banks were able to offer loans at an APR less than maximum permissible APR. Federal Deposit Insurance Company, The FDIC's Small-Dollar Loan Pilot Program: A Case Study after One Year, FDIC Quarterly Vol. 3, No. 2 (2009). The SDLG is located on the FDIC's Web site at *www.FDIC.gov/smalldollarloans.*

Reg Z for FCUs to link fees to the loan amount or charge application fees this high.

The credit worthiness determination in payday lending scenarios is often minimal, consisting of a verification of employment, age, and residence; sometimes, it is less than that. The Board is proposing to restrict FCUs making STS loans to charging an application fee in accordance with the definition in Reg Z that is no more than $20. Reg Z limits application fees to the recovery of costs associated with processing applications for credit that are charged to all consumers who apply, regardless if credit is actually extended. 12 CFR 226.4(c)(1).

The Board believes that, for FCUs to offer an economically-viable product, they must be permitted to recover the costs associated with processing an application up to a reasonable amount. The Board recognizes STS loans present a higher degree of risk, but it is the interest rate, not the application fee, on which FCUs should rely to address that risk. The Board believes an application fee should recoup the costs associated with processing an application, and FCUs should rely on interest income to account for losses and create a sustainable product.

In determining an appropriate maximum application fee, the Board considered the limited underwriting associated with STS loans and the ability of FCUs to process applications efficiently for this product. The Board believes a maximum application fee of $20 would adequately permit FCUs to recover their processing costs and provide a responsible alternative for members.

3. Maturity and Amount

This proposed rule would also set a minimum and maximum maturity and dollar amount for STS loans. The Board believes it is necessary to specifically establish the terms for this type of loan to ensure FCU members are able to manage repayment.

The Act allows the Board to prescribe rules and regulations regarding how loans are to be repaid.

> Loans shall be paid or amortized in accordance with rules and regulations prescribed by the Board after taking into account the needs or conditions of the borrowers, the amounts and duration of the loans, the interest of the members and the credit unions, and such other factors as the Board deems relevant.
>
> 12 U.S.C. 1757(5)(A)(ix).

In considering the nature of STS loans, the Board proposes to set the maturity at a minimum of one month and a maximum of six months. Payday loans generally must be repaid within two weeks, regardless of loan amount, often causing borrowers to roll the loans over to avoid default. The proposed rule prohibits "roll-overs," so FCUs need to set a maturity, within this range, based on the amount of the loan and the borrower's ability to repay. The Board believes setting a minimum and maximum loan term will make STS loans a better alternative to payday loans.

The Board also proposes setting the amount of a qualifying STS loan at a minimum of $200 and a maximum of $1,000. The maximum amount is slightly lower than the average loan amount in the FDIC's pilot program.[7] However, the Board believes a maximum loan amount of $1,000 will provide borrowers with lending comparable to payday lenders and possibly permit borrowers to pay off current payday loans and transition to more responsible FCU products, helping borrowers to break the payday cycle. Regarding the $200 minimum loan, the Board believes this minimum is reasonable in terms of the maximum $20 permissible application fee the rule permits and recognizes there is demand for short-term loans in this amount. Available data suggests the average, traditional payday loan amount is between $300 and $400.[8]

This proposed rule would also impose a limit on the number of STS loans an FCU may lend to a member at any one time and on the total number of these loans an FCU may make to a member in any rolling six-month period. Specifically, an FCU would only be permitted to make one loan at a time to a member and no more than three in any rolling six-month period. The proposed rule also prohibits FCUs from granting roll-overs to a borrower. The Board believes these provisions of the rule will work to curtail a member's repetitive use and reliance on this type of product, which often compounds the member's already unstable financial condition. The Board notes that average borrowers use a payday product in excess of eight times per year, most of which are continuous "roll-overs" of an initial loan.[9] The Board recognizes that continuously "rolling-over" a loan can subject a borrower to additional fees and repayment amounts that are substantially more than the initial amount borrowed. The Board believes that this proposed rule offers terms that will eliminate the need for a borrower to roll over a loan.

FCUs should set a loan amount and loan terms based on the borrower's ability to repay. The Board notes FCUs are not expected to run a credit report on a borrower to determine ability to repay STS loans. Rather, an FCU should be able to use a borrower's proof of recurring income as the key criterion in developing standards for maturity lengths and loan amounts so a borrower can repay the loan without roll-overs. As noted above, the intent of this rule is to permit FCUs to provide a viable, responsible alternative to high-cost payday loans, which will help members break the cycle, improve their credit scores and gain or re-gain access to mainstream financial products.

This rule does not address charging fees for late payments or defaults in an STS loan program. FCUs can impose late fees that comply with NCUA's credit practices rule, 12 CFR Part 706. However, FCUs should be careful that late fees do not exacerbate a borrower's financial situation. FCUs should be careful in setting maturity terms and loan amounts based on a borrower's proof of recurring income so that borrowers will be able to pay off the loan without incurring late fees.

4. Cap on Loan Volume and Underwriting

In addition to the requirements relating to making an STS loan, the proposed rule would require FCUs to include, in their written lending policies, a cap on both the total number and total dollar amount of STS loans. The Board is concerned with the inherent higher risk in STS loans, which may be heightened by an initially high loan volume. The Board believes a high, initial loan volume, coupled with likely higher defaults, could stretch resources for collections and expose the FCU to unnecessary risks.

Alternatively, and in order to limit risks on FCUs' balance sheets and to ensure that STS loan volume does not overwhelm FCUs' lending and collections operations, the Board is considering setting a cap in the final

[7] FDIC cites that 26 banks in the pilot program made 4,338 loans with a total principal balance of $5.2 million. Dividing the total principal balance by the total number of loans equals an approximate average loan of $1,198.71. Federal Deposit Insurance Company, The FDIC's Small-Dollar Loan Pilot Program: A Case Study After One Year, FDIC Quarterly Vol3, no. 2 (2009).

[8] Nancy Pierce, *Payday Lending: The Credit Union Way,* CUNA LENDING COUNCIL & NATIONAL CREDIT UNION FOUNDATION/REAL SOLUTIONS® (2008), available at *http://realsolutions.coop/assets/2008/7/23/NancyPierceCUNALendingCouncilPaydayLendingWhitePaperWithNCUFAndREALSolutions.pdf.*

[9] Keith Ernst, John Farris & Uriah King, *Quantifying the Economic Cost of Predatory Payday Lending,* Center for Responsible Lending (2003), available at *http://www.responsiblelending.org/pdfs/CRLpaydaylendingstudy121803.pdf.*

rule on the dollar amount, percentage and/or number of STS loans that FCUs can have outstanding at any given time. The Board seeks comments on how such a cap could be structured, for example, as a percentage based on assets or other formula, while meeting the overall objectives of this proposed rule.

Finally, the Board is proposing to require FCUs to implement appropriate underwriting criteria for STS loans to minimize risk. In developing underwriting criteria, an FCU should focus on the member's relationship with the FCU and the borrower's ability to repay the loan at or before maturity. Based on the member's potential ongoing relationship with the FCU and the small-dollar amount of the loan, an FCU may only need to review a member's account records and proof of recurring income. To verify proof of income, FCUs should require a member to produce at least two recent paycheck stubs. Below, the Board requests specific comment on requiring borrowers to participate in direct deposit or a payroll deduction program as a condition of an extension of credit under this rule, which may assist an FCU in verifying a member's employment status for underwriting purposes. As noted above, however, the Board does not believe it is generally necessary for an FCU's underwriting to include a credit report. The Board believes an FCU's underwriting criteria should address a member's need for quickly available funds but adhere to the principles of responsible lending.

5. Guidance and Best Practices

Although the Board is not proposing specific underwriting standards, risk avoidance methods, or program features, FCUs should consider the "best practices," discussed below, in developing an STS program. The Board believes the proximity of including the "best practices" in the regulatory text will be helpful to FCUs. These practices are *not* regulatory requirements, but FCUs should consider them in developing an STS program. FCUs should also consider guidance NCUA issued last year on payday alternatives. NCUA Letter to Federal Credit Unions, "Payday Lending" 09–FCU–05 (July 2009) (09–FCU–05) (available on NCUA's Web site at *http://www.ncua.gov/Resources/09–FCU–05.pdf*). In addition, the Board has reviewed the FDIC's SDLG and notes these guidelines also offer prudent suggestions for an FCU to consider in developing an STS loan program.[10]

Although STS loan programs can be a useful method of serving members, there are inherent risks in this type of loan. In developing an STS loan program, FCUs should consider the credit, transaction, fraud, reputation, and compliance risks. FCUs should also consider the risks for members of receiving STS loans and try to minimize them. The Board encourages FCUs to use STS loans as a means of serving more members and, through financial counseling and other methods, attempt to help members move away from STS loans in favor of an FCU's more mainstream products and services. *See* 09–FCU–05. FCUs should also consider offering certain additional features such as a savings component or electronic loan transactions as part of a successful STS program. The Board is also recommending FCUs, at least in the initial stages of an STS loan program, consider a length of membership requirement of at least three months. The Board recognizes there is a higher risk of default among new members as opposed to members with an established relationship with an FCU. The Board is seeking comment on whether a certain length of membership should be required, or whether each FCU should evaluate their own risk tolerance and decide on a membership requirement accordingly. Rather than prescribe specific membership features that must be included in an STS program, this proposed rule would allow an FCU to make this determination based on its capabilities and the needs of its members.

D. Request for Comments

In addition to comments on all aspects of this proposed rule, the Board would appreciate specific comments from credit unions currently offering viable small amount loan programs. In drafting a final rule, the Board is interested in learning from the experience credit unions have had in operating a successful program and the specific features that have led to a program's success as a sustainable and responsible alternative to payday lending. Also, the Board would appreciate comments on certain alternative provisions or requirements that agency staff considered in drafting the proposed rule.

The Board is interested in comments on whether the final rule should require amortization and prohibit balloon payments on STS loans. The Board is concerned that requiring a member to pay back the entire amount or a substantial portion of an STS loan in one payment may not be feasible for some borrowers and may exacerbate a borrower's weak financial situation. The Board is also concerned that STS loans with balloon payments may cause additional financial problems for borrowers or lead them to return to payday lenders.

Another alternative on which the Board requests comments is whether the final rule should set a 36% APR ceiling inclusive of all fees, either in addition to or in lieu of the maximum APR and application fee terms in the proposed regulatory text. The Board notes an all-inclusive APR would not include fees for unanticipated late payments, defaults, delinquencies, or similar occurrences. As noted above, a 36% APR ceiling, inclusive of all fees, would track the approaches of the FDIC in its pilot program and the Department of Defense regulations. Under the proposed rule, it may be difficult for FCUs to offer STS loans to military borrowers in accordance with the Department of Defense regulations.

Finally, the Board requests comments on whether the final rule should require borrowers to participate in direct deposit or a payroll deduction program as a condition of obtaining an STS loan. Direct deposit is the electronic deposit of funds into a member's account, while a payroll deduction program is an automatic deduction from a member's salary before it is deposited in the member's account. Direct deposit and payroll deduction are useful tools in managing an FCU's exposure. Specifically, both direct deposit and payroll deduction can help an FCU verify employment and income levels of a borrower and help determine the appropriate loan term and amount. In addition, direct deposit helps to ensure there is a recurring source of income, which an FCU may be able to use to recoup a defaulted loan. Further, a payroll deduction program provides FCUs with an easy way to ensure payment is made.

Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a proposed rule may have on a substantial number of small credit unions (those under $10 million in assets). This proposed rule increases the interest rate ceiling for STS loans and sets out several STS loan program requirements an FCU must meet to take advantage of the higher interest rates.

[10] The FDIC's SDLG highlights many of the features, including underwriting, that make payday loans attractive to borrowers. Federal Deposit Insurance Company, Final Guidelines for Affordable Small-Dollar Loans, PR–52–2007 (2007).

The proposed rule will not have a significant economic impact on a substantial number of small credit unions, and, therefore, a regulatory flexibility analysis is not required.

Paperwork Reduction Act

This rule adds a requirement that federal credit unions establish a cap on short-term, small-dollar loans in their general written lending policies, which federal credit unions are already required to maintain and is currently approved under the Paperwork Reduction Act control number 3133–0139. NCUA has determined that the requirements of this rule are additions to an FCU's customary business records and do not increase the paperwork requirements under the Paperwork Reduction Act of 1995 and regulations of the Office of Management and Budget.

Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. In adherence to fundamental federalism principles, NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order. The proposed rule would not have substantial direct effects on the states, on the connection between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. NCUA has determined that this proposed rule does not constitute a policy that has federalism implications for purposes of the executive order.

The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families

NCUA has determined that this proposed rule would not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

List of Subjects in 12 CFR Part 701

Credit unions, Federal credit unions.

Mary Rupp,

Secretary of the Board.

For the reasons discussed above, the National Credit Union Administration proposes to amend 12 CFR part 701 as set forth below:

PART 701—ORGANIZATION AND OPERATIONS OF FEDERAL CREDIT UNIONS

1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1759, 1761a, 1761b, 766, 1767, 1782, 1784, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 et seq.; 42 U.S.C. 1981 and 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

In section 701.21, add paragraph (c)(7)(iii) to read as follows:

§ 701.21 Loans to members and lines of credit to members.

* * * * *

(c) * * *

(7) * * *

(iii) *Short-term, small amount Loans (STS loans).* (A) Notwithstanding the provisions in § 701.21(c)(7)(ii), a federal credit union may charge an interest rate of 1000 basis points above the maximum interest rate as established by the Board, provided the federal credit union is making a closed-end loan in accordance with the following conditions:

(*1*) The principal of the loan is not less than $200 or more than $1000;

(*2*) The loan has a minimum maturity term of one month and a maximum maturity term of six months;

(*3*) The federal credit union does not make more than three, STS loans in any rolling six-month period to any one borrower and makes no more than one, short-term, small amount loan at a time to a borrower;

(*4*) The federal credit union must not roll-over any STS loan;

(*5*) The federal credit union charges an application fee to all members applying for a new loan that reflects the actual costs associated with processing the application, but in no case may the application fee exceed $20; and

(*6*) The federal credit union includes, in its written lending policies, a limit on the aggregate number of loans and aggregate dollar amount of loans made under this section and implements appropriate underwriting guidelines to minimize risk; for example, requiring a borrower to verify employment by producing at least two recent pay stubs.

(B) *STS Loan Program Guidance and Best Practices.* In developing a successful STS loan program, a federal credit union should consider how the program will help benefit a member's financial well-being while considering the higher degree of risk associated with this type of lending. The guidance and best practices are intended to help federal credit unions minimize risk and develop a successful program, but are not an exhaustive checklist and do not guarantee a successful program with a low degree of risk.

(*1*) *Program Features.* Several features that may increase the success of an STS loan program and enhance member benefit include adding a savings component, financial education, reporting of members' payment of STS loans to credit bureaus, or electronic loan transactions as part of an STS program.

(*2*) *Underwriting.* Federal credit unions need to develop minimum underwriting standards that account for a member's need for quickly available funds, while adhering to principles of responsible lending. Underwriting standards should address required documentation for proof of employment or income, including at least two recent paycheck stubs. FCUs should be able to use a borrower's proof of recurring income as the key criterion in developing standards for maturity lengths and loan amounts so a borrower can repay the loan without roll-overs. For members with established accounts, FCUs should only need to review a member's account records and proof of recurring income or employment.

(*3*) *Risk Avoidance.* Federal credit unions need to consider risk avoidance strategies, including: Imposing a length of membership requirement, requiring members to participate in a payroll deduct program or direct deposit, and conducting a thorough evaluation of the federal credit unions resources and ability to engage in an STS loan program.

* * * * *

[FR Doc. 2010–10480 Filed 5–4–10; 8:45 am]

BILLING CODE 7535–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 27

[Docket No. FAA–2009–0413; Notice No. 10–04]

RIN 2120–AJ51

Fatigue Tolerance Evaluation of Metallic Structures; Extension of Comment Period

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); extension of comment period.

SUMMARY: This action extends the comment period for a NPRM that was

published on March 12, 2010. In that document, the FAA proposed to amend the airworthiness standards for fatigue tolerance evaluation (FTE) of transport category metallic rotorcraft structures. This notice responds to a request from the European Aviation Safety Agency (EASA) to extend the comment period to the proposal.

DATES: The comment period for the NPRM published on March 12, 2010 (75 FR 11799) which was scheduled to close on June 10, 2010, is extended until July 30, 2010.

ADDRESSES: You may send comments identified by Docket Number FAA–2009–0413 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.
- *Hand Delivery or Courier:* Deliver comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Minh-Hai Tran-Lam, ARM–207, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 493–4963.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please send only one copy of written comments, or if you are filing comments electronically, please submit your comments only one time.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by:

(1) Searching the Federal eRulemaking Portal at *http://www.regulations.gov;*

(2) Visiting the Office of Rulemaking's web page at *http://www.faa.gov/avr/arm/index.cfm;* or

(3) Accessing the Government Printing Office's web page at *http://www.gpoaccess.gov/fr/index.html.*

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the docket number or notice number of this rulemaking.

Background

On March 7, 2010, the Federal Aviation Administration (FAA) published Notice No. 10–04, Fatigue Tolerance Evaluation of Metallic Structures (75 FR 11799, 3/12/2010). Comments to that document were to be received on or before June 10, 2010.

By letter dated March 22, 2010, the European Aviation Safety Agency (EASA) addressed the joint interest in this rulemaking objective on the international level. EASA will be issuing an associated Notice of Proposed Amendment (NPA) with anticipated close of comment period in the July 2010 timeframe. EASA stated that in order to provide final rules that are harmonized as much as possible, it will be essential that technical cooperation is maintained and that comments arising from both the NPRM and NPA processes are jointly dispositioned by technical experts from each aviation authority. EASA requested that the FAA extend the comment period for Notice No. 10–04 to coincide with their NPA close of comment period, to allow the rulemaking processes of the FAA and EASA to better align and to facilitate achieving the objective of common international standards.

Extension of Comment Period

In accordance with § 11.47(c) of title 14, Code of Federal Regulations, the FAA has reviewed the petition made by EASA for extension of the comment period to Notice No. 10–04. This petitioner has shown a substantive interest in the proposed rule and good cause for the extension. The FAA has determined that extension of the comment period is consistent with the public interest, and that good cause exists for taking this action.

Accordingly, the comment period for Notice No. 10–04 is extended until July 30, 2010.

Issued in Washington, DC, on April 30, 2010.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. 2010–10556 Filed 5–4–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 27 and 29

[Docket No. FAA–2009–0660; Notice No. 10–09]

RIN 2120–AJ52

Damage Tolerance and Fatigue Evaluation of Composite Rotorcraft Structures; Reopening of Comment Period

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM); reopening of comment period.

SUMMARY: On January 6, 2010, the FAA published a NPRM proposing to revise airworthiness standards for type certification requirements of normal and transport category rotorcraft. The amendment would address advances in composite structures technology and provide internationally harmonized standards. The public was invited to comment for a 90-day period. The comment period closed on April 6, 2010; however, the FAA is reopening the comment period until July 16, 2010 in response to a request from the European Aviation Safety Agency (EASA). Reopening of the comment period would allow the rulemaking processes of the FAA and EASA to better align and facilitate achieving the objective of common international standards.

DATES: The comment period for the NPRM published on January 6, 2010 (75 FR 793) closed April 6, 2010, and is reopened until July 16, 2010.

ADDRESSES: You may send comments identified by Docket Number FAA–2009–0660 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.
- *Hand Delivery or Courier:* Deliver comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the rulemaking process, *see* the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to *http://www.regulations.gov,* including any personal information you provide. Using the search function of our docket Web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://DocketsInfo.dot.gov.*

Docket: To read background documents or comments received, go to *http://www.regulations.gov* at any time or to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Minh-Hai Tran-Lam, ARM–207, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 493–4963.

SUPPLEMENTARY INFORMATION:

Comments Invited

The FAA invites interested persons to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, please send only one copy of written comments, or if you are filing comments electronically, please submit your comments only one time.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this proposed rulemaking. Before acting on this proposal, we will consider all comments we receive on or before the closing date for comments. We will consider comments filed after the comment period has closed if it is possible to do so without incurring expense or delay. We may change this proposal in light of the comments we receive.

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by:

(1) Searching the Federal eRulemaking Portal at *http://www.regulations.gov;*

(2) Visiting the Office of Rulemaking's Web page at *http://www.faa.gov/avr/arm/index.cfm;* or

(3) Accessing the Government Printing Office's Web page at *http://www.gpoaccess.gov/fr/index.html.*

You can also get a copy by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–9680. Make sure to identify the docket number or notice number of this rulemaking.

Background

On January 6, 2010, the FAA published in the **Federal Register** (75 FR 793) Notice No. 09–12, entitled "Damage Tolerance and Fatigue Evaluation of Composite Rotorcraft Structures" that proposed to revise airworthiness standards for type certification requirements of normal and transport category rotorcraft. The comment period closed April 6, 2010.

By request dated March 22, 2010, EASA addressed the joint interest in this rulemaking objective on the international level. EASA will be issuing an associated Notice of Proposed Amendment (NPA) with anticipated close of comment period in the July 2010 timeframe. EASA stated that in order to provide final rules that are harmonized as much as possible, it will be essential that technical cooperation is maintained and that comments arising from the NPRM and NPA processes are jointly dispositioned by technical experts from each aviation authority. EASA requested that the comment period be extended to coincide with their NPA close of comment period, to allow the rulemaking processes of the FAA and EASA to better align and to facilitate achieving the objective of common international standards.

Reopening of Comment Period

In accordance with § 11.47(c) of title 14, Code of Federal Regulations, the FAA has reviewed the petition made by EASA to reopen the comment period to Notice No. 10–09. This petitioner has shown a substantive interest in the proposed rule and good cause for reopening the comment period. The FAA has determined that reopening the comment period will allow EASA and others additional time for a more thorough review of applicable issues and questions raised by the NPRM and drafting of responsive comments.

To give all interested persons additional time to complete their comments, the FAA finds it is in the public interest to reopen the comment period until July 16, 2010.

Issued in Washington, DC, on April 30, 2010.

Pamela Hamilton-Powell,

Director, Office of Rulemaking.

[FR Doc. 2010–10578 Filed 5–4–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2010–0241; Airspace Docket No. 10–AGL–4]

RIN 2120–AA66

Proposed Modification of VOR Federal Airways V–82, V–175, V–191, and V–430 in the Vicinity of Bemidji, MN

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify the legal description of VHF Omnidirectional Range (VOR) Federal Airways V–82, V–175, V–191, and V–430 in the vicinity of Bemidji, MN. The Bemidji (BJI) VOR, navigation aid that forms a segment of these airways has been out of service for over two years due to terrain and new construction signal interference problems and is planned for decommissioning. An airway intersection reporting point is being established in the same location as the BJI VOR to restore a navigable route structure to the area similar to what existed prior to the loss of service from the navigation aid.

DATES: Comments must be received on or before June 21, 2010.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, M–30, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001; telephone: (202) 366–9826. You must identify FAA Docket No. FAA–2010–0241 and Airspace Docket No. 10–AGL–4 at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace and Rules Group, Office of System Operations Airspace and AIM, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2010–0241 and Airspace Docket No. 10–AGL–4) and be submitted in triplicate to the Docket Management Facility (*see* **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA–2010–0241 and Airspace Docket No. 10–AGL–4." The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (*see* **ADDRESSES** section for address and phone number) between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, Operations Support Group, Federal Aviation Administration, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking, (202) 267–9677, for a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to modify V–82, V–175, V–191, and V–430 in the vicinity of Bemidji, MN. The BJI VOR navigation aid, used in each of these airways, has been out of service for over two years due to excessive bends, roughness, and scalloping on all radials below 5,000 feet Mean Sea Level (MSL), and was removed from service in April 2007. The FAA had trees removed within 1,000 feet of the navigation aid, but no improvement was noted. As a result, the BJI VOR, MN, is scheduled for decommissioning on July 29, 2010.

Since V–82, V–175, V–191, and V–430 are currently not useable in the vicinity of the BJI VOR, air traffic control must vector aircraft in this area until the aircraft reaches a useable segment of the airways. To restore the navigable airway structure in the vicinity of Bemidji, MN, the FAA is proposing to establish the BLUOX fix in the same location currently depicting the BJI VOR navigation aid. Specifically, the proposed modification to V–82 and V–175 replaces the BJI VOR with an intersection point defining the BLUOX fix. The proposed modification to V–191 terminates the airway at the Grand Rapids VOR (GPZ), MN, since the modified V–430, as proposed below, would provide service to the same segments of V–191 being eliminated. Lastly, the proposed modification to V–430 reroutes the airway between BLUOX fix and Grand Forks VOR (GFK), ND, over the Thief River Falls VOR (TVF), MN. The reroute is necessary due to the GFK VOR signal not being strong enough to establish the intersection point defining the BLUOX fix between the GFK VOR and the GPZ VOR.

VOR Federal airways are published in paragraph 6010(a) of FAA Order 7400.9T signed August 27, 2009 and effective September 15, 2009, which is incorporated by reference in 14 CFR 71.1. The VOR Federal Airways listed in this document would be subsequently published in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this proposed regulation: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3)

does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in subtitle VII, part A, subpart I, section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it modifies VOR Federal Airways in the vicinity of Bemidji, MN.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, "Environmental Impacts: Policies and Procedures," prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the FAA Order 7400.9T, Airspace Designations and Reporting Points, signed August 27, 2009, and effective September 15, 2009, is amended as follows:

Paragraph 6010(a)—Domestic VOR Federal Airways

* * * * *

V–82 [Modified]

From Baudette, MN; INT Baudette 194°T (190°M) and Brainerd, MN, 331°T (328°M) radials; Brainerd; Gopher, MN; Farmington, MN; Rochester, MN; Nodine, MN; to Dells, WI.

* * * * *

V–175 [Modified]

From Malden, MO; Vichy, MO; Hallsville, MO; Macon, MO; Kirksville, MO; Des Moines, IA; Sioux City, IA; Worthington, MN; Redwood Falls, MN; Alexandria, MN; Park Rapids, MN; INT Park Rapids 003°T (359°M) and Roseau, MN, 160°T (155°M) radials; Roseau; to Winnipeg, MB, Canada. The airspace within Canada is excluded.

* * * * *

V–191 [Modified]

From Troy, IL; Decatur, IL; Roberts, IL; INT Roberts 008°T (006°M) and Joliet, IL, 067°T (065°M) radials; Northbrook, IL; Badger, WI; Oshkosh, WI; Rhinelander, WI; Ironwood, MI; Duluth, MN; Hibbing, MN; to Grand Rapids, MN.

* * * * *

V–430 [Modified]

From Cut Bank, MT, 10 miles, 74 miles 55 MSL; Harve, MT, 14 miles, 100 miles 50 MSL; Glasgow, MT; INT Glasgow 100°T (086°M) and Williston, ND, 263°T (251°M) radials, 22 miles, 33 miles 55 MSL, Williston; Minot, ND; Devils Lake, ND; Grand Forks, ND; Thief River Falls, MN; INT Thief River Falls 122°T (114°M) and Grand Rapids, MN, 292°T (286°M) radials; Grand Rapids; Duluth, MN; Ironwood, MI; Iron Mountain, MN; to Escanaba, MI.

Issued in Washington, DC, on April 29, 2010.

Paul Gallant,

Acting Manager, Airspace and Rules Group.

[FR Doc. 2010–10468 Filed 5–4–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1904

[Docket No. OSHA–2010–0024]

Modernization of OSHA's Injury and Illness Data Collection Process

AGENCY: Occupational Safety and Health Administration (OSHA), Labor

ACTION: Stakeholder meetings and request for public comment.

SUMMARY: OSHA invites interested parties to participate in informal stakeholder meetings on the modernization of OSHA's injury and illness data collection system. OSHA encourages stakeholders who cannot participate to submit written comments. OSHA needs to gather information from stakeholders in order to be able to modify its current injury and illness recordkeeping regulation and develop a modernized recordkeeping system in ways that will help OSHA, employers, employees, researchers, and the public prevent workplace injuries and illnesses as well as, supporting President Obama's Open Government Initiative, increase the ability of the public to easily find, download, and use the resulting dataset generated and held by the Federal Government. The informal discussions at the stakeholder meetings and the written comments from stakeholders will help give OSHA this information.

DATES: The meeting dates are:

- May 25, 2010, 8:30 a.m. to 4:30 p.m., Washington, DC.
- June 3, 2010, 8:30 a.m. to 4:30 p.m., Chicago, IL.

Written comments must be submitted (postmarked, sent, or received) by June 18, 2010.

ADDRESSES:

I. Registration

Submit your notice of intent to participate in one of the scheduled meetings by one of the following:

- *Electronic.* Register at: *https://www2.ergweb.com/projects/conferences/osha/register-datacollection.htm* (follow the instructions online).
- *Facsimile.* Fax your request to: 781–674–2906 and label it "Attention: OSHA Data Collection Process Stakeholder Meeting Registration."
- *Regular mail, express delivery, hand (courier) delivery, and messenger service.* Send your request to: Eastern Research Group, Inc., 110 Hartwell Avenue, Lexington, MA 02421; Attention OSHA Data Collection Process Stakeholder Meeting Registration.

II. Meetings

In Washington, DC, the meeting will be held on May 25, 2010, from 8:30 a.m. to 4:30 p.m., at the U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue, NW., Washington, DC 20210.

In Chicago, Illinois, the meeting will be held on June 3, 2010, from 8:30 a.m. to 4:30 p.m., at the OSHA Training Institute, 2020 South Arlington Heights Rd., Arlington Heights, IL 60005.

III. Public Comment

You may submit comments, identified by Docket No. OSHA–2010–0024, by any one of the following methods:

• *Electronically:* You may submit comments and attachments electronically at *http://www.regulations.gov,* the Federal eRulemaking Portal. Follow the instructions on-line for making electronic submissions.

• *Fax:* If your comments, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

• *Mail, hand delivery, express mail, messenger or courier service:* You must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2010–0024, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2350 (OSHA's TTY number is (877) 889–5627). Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.–4:45 p.m., e.t.

Instructions: All submissions must include the docket number (Docket No. OSHA–2010–0024). Because of security-related procedures, submission by regular mail may result in significant delay. Please contact the OSHA Docket Office about security procedures for hand delivery, express delivery, messenger or courier.

All comments, including any personal information you provide, are placed in the public docket without change and may be made available on *http://www.regulations.gov.* Therefore, OSHA cautions you about submitting personal information such as Social Security numbers and birthdates.

Docket: To read or download submissions in response to the request for public comment, go to Docket No. OSHA–2010–0024 at: *http://www.regulations.gov.* All submissions are listed in the *http://www.regulations.gov* index. However, some information (e.g., copyrighted material) is not publicly available to read or download through that Web page. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

FOR FURTHER INFORMATION CONTACT: Information is available from the following sources:

• *Press inquiries.* Jennifer Ashley, Director, OSHA Office of Communications, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–1999.

• *General and technical information.* Miriam Schoenbaum, OSHA Directorate of Evaluation and Analysis, Room N–3648, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, telephone (202) 693–1841, electronic mail (e-mail) *Schoenbaum.Miriam@dol.gov.*

• *Copies of this Federal Register notice.* Electronic copies are available at *http://www.regulations.gov.* This **Federal Register** notice, as well as news releases and other relevant information, also are available on the OSHA Web page at *http://www.osha.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In 1970, Congress enacted the Occupational Safety and Health Act (29 U.S.C. 651 *et seq.*) (the Act or the OSH Act). Congress directed the Secretary through section 8(c)(2) of the OSH Act to "* * * prescribe regulations requiring employers to maintain accurate records of, and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job * * *" Section 24(a) of the Act requires the Secretary to develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics. This section directs the Secretary to "compile accurate statistics on work injuries and illnesses which shall include all disabling, serious, or significant injuries and illnesses, whether or not involving loss of time from work, other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job."

29 CFR part 1904, Recording and Reporting Occupational Injuries and Illnesses, was one of the first regulations promulgated by OSHA. First issued in 1971, this rule requires employers to record information on the occurrence of injuries and illnesses in their workplaces. The employer is obligated to record work-related injuries and illnesses that meet one or more of certain recording criteria. In accordance with the OSH Act, OSHA requires employers to record work-related injuries and illnesses that involve death, loss of consciousness, days away from work, restriction of work or motion, transfer to another job, medical treatment other than first aid, or diagnosis of a significant injury or illness by a physician or other licensed health care professional.

29 CFR part 1904 requires all employers under OSHA jurisdiction with 11 or more employees to keep OSHA injury and illness records, unless the establishment is classified in a specific low-hazard retail, service, finance, insurance or real estate industry. In addition, employers with ten or fewer employees must keep OSHA injury and illness records if OSHA or the Bureau of Labor Statistics informs them in writing that they must keep records under part 1904.41 (Annual OSHA injury and illness survey of ten or more employers) or part 1904.42 (Requests from the Bureau of Labor Statistics for data). The recordkeeping rule currently covers roughly 750,000 employers with roughly 1,500,000 establishments. Every year, for all of the employer's establishments, each of these employers must complete OSHA Form 300A (Summary of Work-Related Injuries and Illnesses). In addition, if there is one or more injury or illness at the establishment, the employer must complete OSHA Form 301 (Injury and Illness Incident Report) for each injury or illness and record each injury or illness on OSHA Form 300 (Log of Work-Related Injuries and Illnesses). OSHA estimates that more than 3,000,000 injuries and illnesses are recorded on these forms each year.

The forms contain a substantial amount of information pertaining to the injured or ill employee and the circumstances surrounding the injury or illness. The following data elements are found on the OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Incident Report): Name, title, phone number of person completing form; Date form completed; Date and time of event; Time employee began work; Employee's name; Employee's job title; Where the event occurred; A brief description of injury or illness, parts of body affected, and object/substance that directly injured or made person ill; Severity of the case (death, days away from work, job transfer or restriction, other recordable cases); Number of days injured or ill worker was away from work or restricted; Full name, address, date of birth, date hired, and gender of employee; Name of physician or other health care professional; Name and address of facility if treatment was given away from the workplace; Emergency room treatment and inpatient hospitalization (if applicable); Detailed descriptions of what the employee was doing just before the incident occurred; how the injury occurred, the injury or illness, and the object or substance that

directly harmed the employee; date of death (if applicable).

The records required by this rule are an important source of information for OSHA. During the initial stages of an inspection, an OSHA representative reviews the injury and illness forms maintained by the establishment as an aid to focusing the inspection effort on identified safety and health hazards. OSHA also uses establishment-specific injury and illness information to help target its intervention efforts to the worksites experiencing high rates of injuries and illnesses and to specific safety and health hazards. Injury and illness data help OSHA identify the scope of occupational safety and health problems and decide whether regulatory intervention, compliance assistance, or other measures are warranted. These data are also of great importance to employers and workers in understanding and reducing the incidence of injuries and illnesses in specific workplaces.

Data Collections: Currently, the Department of Labor conducts two annual data collections which gather information entered on the OSHA Forms. The first, conducted by OSHA, is the OSHA Data Initiative (ODI); the second, conducted by the Bureau of Labor Statistics, is the Survey of Occupational Injuries and Illnesses (SOII). While both collections are based on the same source of information, the two differ substantially in the scope and use of the data collected.

The OSHA Data Initiative: In 1995, OSHA established the annual OSHA Data Initiative (ODI) to collect data from approximately 80,000 establishments on injuries and acute illnesses attributable to work-related activities in private-sector industries. 29 CFR part 1904.41 (Annual OSHA injury and illness survey of ten or more employers) provides OSHA the authority to conduct this data collection. The primary purpose of the ODI is to give OSHA the capability of focusing its resources on those establishments with serious safety and health problems. The ODI sample primarily consists of larger establishments (those with 40 or more employees) in industries with historically high rates of occupational injury and illness. Sample selection is designed to ensure that all establishments in the potential data collection universe are surveyed at least once during a three-year cycle. It is not designed to produce estimates of injuries and illnesses for the nation or a particular industry.

Currently, the ODI only collects summary injury and illness data from OSHA Form 300A. From the data collected, the Agency calculates establishment-specific injury and illness rates and uses these rates to target enforcement and compliance assistance activities. Specifically, the data are used to support OSHA's Site-Specific Targeting (SST) enforcement program and its High Rate Letter outreach program. The Agency also makes the individual establishment data available to the public from its website and through Data.gov.

The BLS Survey of Occupational Injuries and Illnesses (SOII): The Bureau of Labor Statistics conducts the SOII, in which employer reports are collected from about 235,000 private-industry establishments. Response to the BLS survey is mandatory, as required by 29 CFR 1904.42 (Requests from the Bureau of Labor Statistics for data).

The survey provides estimates of the number and frequency (incidence rates) of nonfatal workplace injuries and illnesses, based on the OSHA Forms kept by a scientifically-selected probability sample of private-industry employers who were selected to represent the private sector for the Nation and individual industries. Data (through 2008) are classified according to the 2002 North American Industry Classification System (NAICS), the 2000 Standard Occupational Classification (SOC) Manual, and 1997 Standards for Federal Data on Race and Ethnicity, as defined by the Office of Management and Budget (OMB). Race and ethnicity are the only data elements in the survey for which reporting is not mandatory. BLS has generated estimates of injuries and illnesses for many of the 2-, 3-, 4-, 5-, and 6-digit private-sector industries defined in the North American Industry Classification System. The SOII also provides detailed information on the circumstances of cases involving days away from work and the characteristics of the injured or ill workers.

For each incident that led to an injury or illness that required one or more days away from work to recuperate, the survey uses four characteristics to describe the circumstances of the case. These characteristics are classified using the Occupational Injury and Illness Classification System. These four characteristics are:

- Nature—the physical characteristics of the disabling injury or illness, such as cuts/lacerations, fractures, or sprains/strains;
- Part of body affected—the part of body directly linked to the nature of injury or illness cited, such as back, finger, or eye;
- Event or exposure—the manner in which the injury or illness was produced or inflicted, such as falls, overexertion, or repetitive motion; and
- Source—the object, substance, exposure, or bodily motion that directly produced or inflicted the disabling condition, such as chemicals, vehicles, or machinery.

Under the Confidential Information Protection and Statistical Efficiency Act of 2002, BLS is prohibited from releasing establishment-specific data for any purpose other than statistical analysis and therefore does not release establishment data to the general public or OSHA.

II. Issues

One of the priorities of President Obama's Open Government Initiative is to increase the ability of the public to easily find, download, and use datasets generated and held by the Federal Government. OSHA is considering whether the up-to-date, establishment-specific, injury/illness-specific electronic data collected by an improved and modernized OSHA recordkeeping system and made public under the Open Government Initiative would encourage innovative ideas and allow employers, employees, and researchers to participate in improving occupational safety and health.

While both the OSHA and BLS data collection systems provide a vast amount of information, both have limitations that affect OSHA's ability to make decisions based on data.

The ODI currently provides only summary data for each establishment; these data do not allow OSHA to identify specific types of hazards or problems in a given establishment. Further, there is as long as a two- or three-year lag in the current OSHA data collection system between the occurrence of an injury or illness and OSHA's use of the data.

BLS data are available in the year following the calendar year in which the injury or illness occurs and provides a wide range of estimates by industry, establishment size, and details of the injuries and illnesses. These data indicate which types of injury or illness occur in establishments in a particular industry and establishment size; specifics vary from establishment to establishment. BLS data identify, for example, the industries that have reported the highest rate of amputations or musculo-skeletal disorders; they do not identify the specific establishments where such cases actually did occur and are likely to occur in the future.

III. Topics and Questions for Stakeholder Meetings and Public Comments

OSHA would like to gather information about a modernized electronic recordkeeping system from a wide range of interests. Topics include:

- Scope of the data collected
- Uses of the data collected
- Methods of data collection
- Economic impacts
- Additional topics

In addition, OSHA is interested in answers to the following specific questions:

- What recordkeeping data should the electronic recordkeeping system collect?
- Would linking the recordkeeping data with other sources (e.g., medical records, workers' compensation records) increase its usefulness and/or accuracy? If so, which sources? What potential technical and legal hurdles exist in linking to other data sources, and how might these be overcome?
- Should the electronic recordkeeping system collect data from every employer under OSHA jurisdiction for every case, or should it be limited to a subset of employers and/or cases, for example based on size, industry, incidence rate, occupation, or case severity?
- What purposes could the collected recordkeeping data serve for OSHA as well as other users?
- How could the collected data be used to make national or sector-specific estimates of injury and illness?
- What would be the strengths and limitations of the collected data?
- Would publishing data indicating the number of employees and number of employee hours worked at specific establishments disclose confidential commercial or trade secret information?
- How can OSHA use state and other federal agency data collection experience in developing an electronic recordkeeping system?
- How should OSHA design an effective quality assurance program for data entered into the electronic recordkeeping system?
- Should data be collected on a flow basis or periodically, e.g., quarterly? What are the advantages and disadvantages of each approach to data collection?
- What would be the benefits and disadvantages of implementing a new electronic recordkeeping system incrementally, e.g., starting with the largest employers or the most severe injuries?
- What training and outreach will be necessary for employers to comply with the requirements of the electronic recordkeeping system?
- How can OSHA ensure that small-business employers are able to comply with the requirements of the electronic recordkeeping system?
- What analytical tools could be developed and provided to employers to increase their ability to effectively use the injury and illness data?
- How can OSHA improve the accuracy of recordkeeping data by encouraging reporting and recording of work-related injuries and illnesses and discouraging underreporting and underrecording of work-related injuries and illnesses?

IV. Public Participation

Stakeholder Meetings

At the stakeholder meetings, OSHA will gather information about a modernized electronic recordkeeping system from a wide range of interests. The meetings will be conducted as a group discussion. To encourage group interaction, OSHA will not allow formal presentations. There will be two sessions at each meeting, each accommodating approximately 25 participants and lasting about four hours. Members of the general public who want to observe but not participate in the meetings are welcome on a first-come, first-served basis, as space permits. OSHA staff will be present to take part in the discussions. Logistics for the meetings are managed by Eastern Research Group (ERG), which will provide a facilitator and compile notes summarizing the discussion; these notes will not identify individual speakers. ERG also will make an audio recording of each session to ensure that the summary notes are accurate; these recordings will not be transcribed. The summary notes will be available on OSHA's Web page at *http://www.osha.gov.*

The meetings are as follows:

- In *Washington, DC,* the meeting will be held on May 25, 2010, from 8:30 a.m. to 4:30 p.m., at the U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue, NW., Washington, DC, 20210.
- In *Chicago, Illinois,* the meeting will be held on June 3, 2010, from 8:30 a.m. to 4:30 p.m., at the OSHA Training Institute, 2020 South Arlington Heights Rd., Arlington Heights, IL, 60005.

You may submit notice of intent to participate in one of the stakeholder meetings electronically, by facsimile, or by hard copy. See the **ADDRESSES** section of this notice for the registration Web site, facsimile number, and address. To register electronically, follow the instructions provided on the Web site. To register by mail or facsimile, please indicate the following:

- Name, address, phone, fax, and e-mail.
- First and second preferences of meeting time.
- Organization for which you work.
- Organization you represent (if different).
- Stakeholder category: government, industry, standards-developing organization, research or testing agency, union, trade association, insurance, consultant, or other (if other, please be specific).
- Industry sector (if applicable).

Electronic copies of this **Federal Register** notice, as well as news releases and other relevant documents, are available on the OSHA Web page at: *http://www.osha.gov.*

Public Comment

OSHA invites comment on all aspects of the modernization of OSHA's injury and illness data collection system. Interested parties must submit comments by June 18, 2010. The Agency will carefully review and evaluate all comments, information, and data, as well as all other information in the record, to determine how to proceed.

You may submit comments in response to this document (1) electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (FAX); or (3) by hard copy. All submissions must identify the Agency name and the OSHA docket number (Docket No. OSHA–2010–0024) of this notice. You may supplement electronic submissions by uploading document files electronically. If, instead, you wish to mail additional materials in reference to an electronic or fax submission, you must submit them to the OSHA Docket Office (see **ADDRESSES** section). The additional materials must clearly identify your electronic comments by name, date, and docket number, so OSHA can attach them to your comments.

Because of security-related procedures, the use of regular mail may cause a significant delay in the receipt of submissions. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Access to Docket

Comments in response to this **Federal Register** notice are posted without change at *http://www.regulations.gov,* the Federal eRulemaking portal.

Therefore, OSHA cautions individuals about submitting personal information such as social security numbers and birthdates. Exhibits referenced in this **Federal Register** document are posted at *http://www.regulations.gov.* Although submissions are listed in the *http://www.regulations.gov* indexes, some information (e.g., copyrighted material) is not publicly available to read or download through that Web page. All comments are available for inspection and copying at the OSHA Docket Office. Information on using *http://www.regulations.gov* to submit comments and access dockets is available on the Web page. Contact the OSHA Docket Office for information about materials not available through the Web page and for assistance in using the Internet to locate docket submissions.

Electronic copies of this **Federal Register** document are available at: *http://www.regulations.gov.* This document, as well as news releases and other relevant information, also are available at OSHA's Web page at: *http://www.osha.gov.*

V. Authority and Signature

This document was prepared under the direction of David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, pursuant to sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), 29 CFR part 1911, and Secretary's Order 5–2007 (72 FR 31160).

Signed at Washington, DC, on April 26, 2010.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2010–10163 Filed 5–4–10; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

Docket No. OSHA–2007–0024]

RIN 1218–AC23

Notice of Availability of the Regulatory Flexibility Act Review of the Methylene Chloride Standard

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Availability of completed regulatory review.

SUMMARY: The Occupational Safety and Health Administration (OSHA) has completed a review of the Methylene Chloride (MC) Standard (29 CFR 1910.1052) pursuant to section 610 of the Regulatory Flexibility Act and section 5 of Executive Order 12866 on Regulatory Planning and Review. The purpose of this review was to determine whether the MC Standard has functioned as intended, whether it could be simplified or improved to reduce the regulatory burden on small businesses, or whether it is no longer needed and should be rescinded.

DATES: As of May 5, 2010 the report is available to the public, (*see* **ADDRESSES** section to obtain copies).

ADDRESSES: Copies of the entire report may be obtained from the OSHA Publications Office, Room N–3101, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–1888; fax (202) 693–2498. All documents and comments received relevant to the review and documents discussed in this report are available at the OSHA Docket Office, Docket No. OSHA–2007–0024, Technical Data Center, Room N–2625, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210, Telephone (202) 693–2350. The main text of the report, this **Federal Register** Notice and any news releases will become available at the OSHA Webpage at *http://www.OSHA.gov*. Electronic copies of this **Federal Register** Document, the full text of the report, comments and referenced documents are or will become available at *http://www.regulations.gov*.

FOR FURTHER INFORMATION CONTACT: General information: Joanna Dizikes Friedrich, OSHA Directorate of Evaluation and Analysis, Room N–3641, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC, 20210; telephone (202) 693–1939.

SUPPLEMENTARY INFORMATION:

Background

MC (also known as methylene dichloride or dichloromethane [DCM or MC]) is a common industrial solvent used in a number of different applications, including paint stripping, metal cleaning and the manufacture of plastics and adhesives. Without proper ventilation or respiratory protection, short-term exposure to large amounts of MC can cause respiratory or central nervous system failure. In 1985, the U.S. Environmental Protection Agency (EPA) determined that MC was a probable human carcinogen and posed a long term danger to human health.[1] EPA promulgated rules governing the use of MC in several industries during 1994–1995. On January 10, 1997, OSHA published its final MC Standard to protect workers from occupational exposure to MC.[2] It reduced the permissible exposure limit from an 8-hour-time-weighted-average (TWA) of 500 parts per million (ppm) to 25 ppm.[3]

Regulatory Review

The purpose of this lookback study was to review the current MC Standard, in accordance with section 610 of the Regulatory Flexibility Act and Section 5 of Executive Order 12866, to determine whether the rule has functioned as intended, whether it could be simplified or improved, or whether it is no longer needed and should be rescinded. The purpose of a review under section 610 of the Regulatory Flexibility Act is:

"to determine whether such rule should be continued without change, or should be rescinded, or amended consistent with the stated objectives of applicable statutes to minimize any significant impact of the rules on a substantial number of small entities."

In conducting a section 610 review, the Agency must consider the following factors:

"(1) The continued need for the rule;
(2) The nature of complaints or comments received concerning the rule from the public;
(3) The complexity of the rule;
(4) The extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
(5) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule."

The review requirements of section 5 of EO 12866 require agencies:

"To reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the [Agency] have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not duplicative or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive Order, within applicable law; and to otherwise improve the effectiveness of existing regulations."

To carry out its lookback review of the MC Standard under these provisions, OSHA requested public comment, on July 10, 2007, on: the impacts of the rule

[1] 62 FR 1497, January 10, 1997.

[2] 62 FR 1494.

[3] Regulatory Impact Analysis (Methylene Chloride) ES–2, January 7, 1996.

on small businesses; the benefits and utility of the rule in its current form and, if amended, in its amended form; the continued need for the rule; the complexity of the rule; and whether, and to what extent, the rule overlaps, duplicates, or conflicts with other Federal, State, and local government rules. OSHA also asked for comments on new developments in technology, economic conditions, or other factors affecting the ability of covered firms to comply with the standard. Furthermore, OSHA asked for comments on alternatives to the rule that would minimize significant impacts on small businesses while achieving the objectives of the Occupational Safety and Health Act.

Conclusions and Recommendations

OSHA's Section 610 review of the MC Standard finds the following:

- There is a continued need for the Standard.
- The Standard does not impose an unnecessary or disproportionate burden on small businesses or on industry in general.
- Although the Standard does impose costs, these costs are essential to protecting worker health.
- This lookback review did not identify any industries in which the Standard diminished the industries' viability.
- There is no indication that employers are unable to comply due to the complexity of the Standard.
- The Standard does not overlap, duplicate, or conflict with other state or federal rules.
- Economic and technological trends have not reduced the need for the Standard.
- No public commenter felt the MC Standard should be rescinded. Several of the comments underscored the hazards associated with exposure to MC and that it is feasible to comply with the Standard. Other comments contained specific suggestions for how compliance with the Standard could be improved through compliance assistance, and how worker health could be improved through information on the toxicity of substitutes for MC use.

OSHA's review of the MC Standard under EO 12866 finds the following:

- The Standard remains justified and necessary in light of ongoing hazards and fatalities.
- In general, the Standard is compatible and not duplicative with other state or federal rules.
- The Standard remains consistent with E.O. 12866 because it has produced the intended benefits (i.e., protecting workers' health), and has not been unduly burdensome.

OSHA concludes that the MC Standard has protected workers from adverse health effects resulting from exposure to MC in the workplace. In terms of economic impacts, the MC Standard does not impose an unnecessary or disproportionate burden on small businesses or on industry in general. Although the Standard does impose costs, these costs are essential to protecting worker health. This lookback review did not identify any industries in which the MC Standard diminished the industries' viability.

OSHA recommends the following:

- The MC Standard should continue without change.
- According to public comments, lack of information and training are the most common barriers in the construction industry for compliance with the MC Standard. Therefore, OSHA recommends reviewing its compliance assistance materials to determine the need for updates. OSHA also recommends reviewing the adequacy of how these materials are disseminated and additional means for reaching affected populations.
- The use of substitutes for MC has increased in certain industries. These substitutes may pose their own health hazards. Therefore, based on public comments, OSHA will consider putting out guidance recommending that, before a substitute for MC is used, the toxicity of that substitute should be checked on the EPA and NIOSH Web sites (*http://www.epa.gov* and *http://www.niosh.gov*, respectively).

Authority: This document was prepared under the direction of David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue, NW., Washington, DC 20210. It is issued under Section 610 of the Regulatory Flexibility Act (5 U.S.C. 610) and Section 5 of Executive Order 12866 (58 FR 51735, October 4, 1993).

Signed at Washington, DC, on April 26, 2010.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2010–10107 Filed 5–4–10; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 1

RIN 2900–AN42

Drug and Drug-Related Supply Promotion by Pharmaceutical Company Sales Representatives at VA Facilities

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations regarding access to VA facilities to control the promotion of drugs and drug-related supplies at VA facilities and the business relationships between VA staff and sales representatives promoting drugs and drug-related supplies. The purposes of the proposed rule are to reduce or eliminate any potential for disruption in the patient care environment, manage activities and promotions at VA facilities, and provide sales representatives with a consistent standard of permissible business practice at VA facilities. It would also facilitate mutually beneficial relationships between VA and such sales representatives.

DATES: Comments must be received by VA on or before July 6, 2010.

FOR FURTHER INFORMATION CONTACT: Louis E. Cobuzzi, PBM Services (119), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; (202) 461–7362. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: Under 38 U.S.C. 303, the Secretary of Veterans Affairs is responsible for "the proper execution and administration of all laws administered by the Department and for the control, direction, and management of the Department." The Secretary has authority to prescribe all rules necessary to carry out the laws administered by the Department, such as section 303 regarding control and management of the Department. *See* 38 U.S.C. 501(a). VA has implemented this authority, as it pertains to management of VA facilities, in 38 CFR part 1.

VA proposes to amend 38 CFR part 1 to regulate access to VA medical facilities by sales representatives (including account managers and clinical liaisons) promoting drugs and drug-related supplies. Currently, many policies regarding access to VA facilities are established and maintained at the local level, either by Veterans Integrated Service Network (VISN) leaders or by

administrators at particular facilities. A VISN, which we define in proposed § 1.220(a), is a network of all VA health care facilities located in a particular region. There are 21 such regions, and the areas that they service can be found at *http://www.vacareers.va.gov/networks.cfm.* The proposed rule would prescribe Department-wide rules that must be followed at the VISN and local levels. We note that the proposed rules are consistent with past VA policy and practice.

VA proposes this rule to prescribe the circumstances under which sales representatives from pharmaceutical companies promoting drugs and drug-related supplies may be granted access to VA facilities. This rule is necessary to limit such access to those circumstances that benefit VA from an educational standpoint, while avoiding potential disturbance to patient care and ensuring compliance with standards of ethical conduct. Pharmaceutical sales representatives have heavy interaction with local VA staff each year, and this rule will ensure that their activities do not negatively affect the quality of patient care. The proposed rule would also assist these sales representatives by providing clear standards, applicable to all VA facilities nationwide, which are consistent with current practices at most VA facilities. The proposed rule would require the Chief of Pharmacy or other official responsible for such decisions to approve educational programs and materials presented or furnished by these sales representatives, so as to ensure that those programs and materials focus on clinician education as opposed to marketing of drugs and drug-related supplies. The proposed rule would generally deny sales representatives access to patient care areas in VA facilities to ensure patient privacy, and would require them to make appointments at the facilities they intend to visit as opposed to open and unrestricted access. Further, the proposed rule would prohibit sales representatives from furnishing any food to VA staff or gifts above the de minimis value set forth in the standards of ethical conduct for Federal employees, and would prohibit VA employees' personal acceptance of drug samples.

We propose to designate this rule as § 1.220. Currently, § 1.218, regarding security and law enforcement at VA facilities, describes general behavior that is prohibited on the grounds of VA property. Proposed § 1.220, would govern the behavior of particular individuals (sales representatives) on the grounds of VA medical facilities, but is not a security and law enforcement provision as it is not our intention to prescribe a fine for failure to comply with this rule. (VA is required to provide for a fine and/or imprisonment for violations of the security and law enforcement provisions at § 1.218 (38 U.S.C. 901)).

In proposed paragraph (a), we would set forth definitions applicable to this section. In particular, we would use current policy and practice to define "Criteria-for-use" as clinical criteria describing how certain drugs may be used in VA. The criteria-for-use are, and will continue to be, posted on VA's Web site at *http://www.pbm.va.gov.* The definition would note that local exceptions may apply "for operational reasons." An example of the need for a local exception might be if a particular facility within a VISN (*e.g.,* a Community-Based Outpatient Clinic (CBOC)) did not have a physician with the required expertise about a particular drug to prescribe. Under the exception, a primary care provider might direct that the drug be prescribed at a different facility within the VISN (*e.g.,* a VA hospital) where a suitable physician could be found. We note that such exceptions at the local level are not posted on our Web site, or elsewhere, because they are subject to change and because they do not have any general effect on the approval of the drug for use within VA. For example, if the particular facility hires a physician with the required expertise to administer the drug within its approved criteria for use, or if a physician within the facility obtains such expertise through training. We also note that such exceptions have no effect on the use of the drug elsewhere within the VISN. Thus, these exceptions do not have a broad or national effect on pharmaceutical companies.

We would broadly define "drugs" and "drug-related supplies" because we intend these terms to be inclusive of all items typically promoted by pharmaceutical sales representatives. Similarly, paragraph (a) would define "VA medical facility" as "any property under the charge and control of VA used to provide medical benefits." These broad definitions would ensure that the proposed rule applies to the largest possible number of sales representatives and VA medical facilities, including but not limited to hospitals, CBOCs, nursing homes, and domiciliaries.

We would define "VA National Formulary (VANF) drugs and/or drug-related supplies" as "any drug or drug-related supply that must be available for prescription at all VA medical facilities," and would provide the public with a means to obtain the most current list of such drugs or drug-related supplies. Non-VANF drugs or drug-related supplies would be defined as drugs or drug-related supplies that are not included on the list of VANF drugs or drug-related supplies.

Proposed paragraph (b) would set forth the general rule applicable to the promotion of drugs and drug-related supplies. It would state that notwithstanding § 1.218(a)(8), regarding soliciting, vending, and debt collection on VA property, VA would allow promotion in VA medical facilities of VANF and non-VANF drugs or drug-related supplies if the promotion is consistent with criteria-for-use, the drug is not classified as non-promotable, and the promotion is otherwise consistent with the proposed rule and with facility initiatives. It would clearly be against the interests of VA and our patients to allow a promotion that did not meet these three criteria, which are consistent with past policy and practice. This rule would be an exception to § 1.218(a)(8) because that rule bars solicitations "of any kind" on VA property, and otherwise precludes behavior (such as posting signs and distributing literature) that would be specifically authorized by § 1.220.

Proposed paragraph (c) would apply only to the promotion of non-VANF drugs or drug-related supplies without criteria-for-use. Such promotions are generally for new molecular entities or new indications for existing drugs, and such promotions must be regulated at the local level in order to allow for different clinical approaches. The promotion of new molecular entities would be permitted, but any decision allowing the promotion of such a drug would be reconsidered if the VANF committee reviews the drug and grants or denies VANF status. Because new molecular entities generally do not have a history of significant published studies in populations similar to the VA patient population and may not be part of an established drug class, it is important that the proposed rule allow VA medical professionals to become educated through the promotion of such drugs but, at the same time, ensure that promotions are consistent with National policy.

Proposed paragraphs (d) and (f) would be general rules applicable to educational programs and materials (paragraph (d)) and the behavior of sales representatives on the grounds of VA medical facilities (paragraph (f)). These rules would attempt to balance the benefits of such promotion against the need to maintain an appropriate clinical environment at VA facilities, safeguarding the peace and privacy of

patients and ensuring that VA personnel are able to perform their jobs without unnecessary interference. The rules would also avoid any appearance of bias for or against particular drug manufacturers by closely regulating the use of advertising material and display of brand names, logos, and sponsorships. An appearance of bias in a drug promotion situation could significantly undermine the trust of patients or the public in VA doctors. Proposed paragraph (e), in addition to furthering the policies described above that support paragraphs (d) and (f), would regulate the receipt of gifts and donations to ensure that VA maintains appropriate relationships with drug companies and suppliers.

In paragraph (g), we would set forth the consequences for noncompliance with this section. Any individual, or any company, that fails to comply with this section would be subject to limitations on the right to access VA facilities, which may include suspension of a sales representative's access privileges, or, in extreme cases, denying access to a company's entire sales force. Consistent with the Secretary's delegations of authority to the Under Secretary for Health and the Under Secretary's further delegation of authority to certain Veterans Health Administration officials, the proposed rule would authorize the director of the VA Medical Center of jurisdiction to issue appropriate orders restricting access to facilities under the director's control. This is the person who would be in the best position to determine whether any violation of the proposed rule requires restrictions on access to particular VA facilities or whether an opportunity for corrective action by the individual or company will suffice. In most cases, we expect that the infraction would be adequately addressed by the sales representative and no formal action would be required.

Procedurally, paragraph (g) would require the director to notify the sales representative or company of the violation and any proposed restrictions on access privileges before issuing any final order. The director would be required to provide notice to a company's sales manager if the proposed action would result in a denial of access privileges for the company's entire sales force. Affected persons and companies would have 30 days after the date of the notice to provide the director a response; however, during that 30-day period the proposed action would be enforced. This is necessary to ensure that noncompliance does not continue during the 30-day period. After considering the requirements of the proposed rule, the circumstances of the improper conduct, and any response submitted by the sales representative or company, the director would either resolve the matter informally or issue a final order restricting access.

Under proposed paragraph (g)(4), in cases where the director issues a final order suspending or permanently barring a company's entire sales force, the director would be required to provide notice of the company's right to a one-time appeal of the matter to the Under Secretary for Health. Any such request for the Under Secretary's review would be submitted to the director that issued the order within 30 days of the date of the order. The director would then forward the initial notice, the company's response, the director's order, and the company's request for review to the Under Secretary for a final decision. The director's order would be enforced until the Under Secretary's review is complete. This mechanism provides important due process to companies seeking to appeal such final orders.

We note that in most cases, sales representatives are considerate of VA's needs and mission, and do not behave inappropriately. Accordingly, we do not envision that the proposed paragraph (g) would be invoked with regularity.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a regulatory action as a "significant regulatory action," requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, if it is a regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any given year. This proposed rule would have no such effect on State, local, or tribal governments, or on the private sector.

Paperwork Reduction Act

The proposed rule does not contain any collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3520).

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. This proposed rule would not cause a significant economic impact on health care providers, suppliers, or other small entities. The proposed rule generally concerns the promotion of drugs by large pharmaceutical companies and only a small portion of the business of such entities concerns VA beneficiaries. Therefore, pursuant to 5 U.S.C. 605(b), this proposed amendment is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance numbers and titles are 64.009 Veterans Medical Care Benefits, 64.010 Veterans Nursing Home Care and 64.011 Veterans Dental Care.

List of Subjects in 38 CFR Part 1

Administrative practice and procedure, Archives and records, Cemeteries, Claims, Courts, Crime, Flags, Freedom of Information, Government employees, Government property, Infants and children, Inventions and patents, Parking, Penalties, Privacy, Reporting and

recordkeeping requirements, Seals and insignia, Security measures, Wages.

Approved: December 30, 2009.

John R. Gingrich,

Chief of Staff, Department of Veterans Affairs.

For the reasons set forth in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 1 as follows:

PART 1—GENERAL PROVISIONS

1. The authority citation for part 1 continues to read as follows:

Authority: 38 U.S.C. 501(a), and as noted in specific sections.

2. Add § 1.220 to read as follows:

§ 1.220 Promotion of drugs and drug-related supplies at VA medical facilities.

(a) *Definitions.* For the purposes of this section:

Criteria-for-use means clinical criteria developed by the Department of Veterans Affairs (VA) at a National level that describe how certain drugs may be used. VA's criteria-for-use are available to the public at *www.pbm.va.gov*. Exceptions may be applied at the local level for operational reasons.

Drugs means pharmaceuticals or chemicals intended for use by a patient or, in some cases, for medical research.

Drug-related supplies means supplies related to the use of a drug, such as test strips or testing devices.

New molecular entity refers to an active ingredient that has never before been marketed in the United States in any form.

Non-VANF drugs or drug-related supplies are drugs or drug-related supplies that do not appear on the VA National Formulary.

VA medical facility means any property under the charge and control of VA used to provide medical benefits, including Community-Based Outpatient Clinics and similar facilities.

VA National Formulary (VANF) drugs and/or drug-related supplies means any drug or drug-related supply that must be available for prescription at all VA medical facilities. A list of VANF drugs or drug-related supplies is available at *www.pbm.va.gov,* or may be requested by contacting the local office of the Chief of Pharmacy Services.

Veterans Integrated Service Network (VISN) means one of the 21 networks of VA medical facilities.

(b) *Permissible promotion of drugs and drug-related supplies.* Notwithstanding § 1.218(a)(8), VA will allow promotion in VA medical facilities of VANF and non-VANF drugs or drug-related supplies if all of the following are true:

(1) The promotion is consistent with any existing criteria-for-use.

(2) The drug or drug-related supply has not been classified by VA as non-promotable. A list of the drugs or drug-related supplies classified by VA as non-promotable is available at *www.pbm.va.gov,* or may be requested by contacting the local office of the Chief of Pharmacy Services.

(3) The promotion is otherwise consistent with this section.

(4) The promotion is consistent with facility initiatives.

(c) *Promotion of non-VANF drugs and drug-related supplies without criteria-for-use.* Under paragraph (b) of this section, non-VANF drugs or drug-related supplies must be promoted consistent with any existing criteria-for-use. Non-VANF drugs without criteria-for-use may be promoted only if:

(1) Specifically permitted by the VISN Pharmacy Executive;

(2) Authorized by the Chief of Pharmacy with jurisdiction over the VA medical facility at which the promotion occurs; and

(3) In a case where a VISN Formulary Leader has permitted the promotion of a new molecular entity prior to any decision regarding its VANF status, such permission must be reconsidered if the new molecular entity:

(i) Is subsequently granted VANF status but is labeled non-promotable; or

(ii) A decision is made to deny VANF status.

(d) *Educational programs and materials.* All educational programs and materials must be approved by the person at the VA medical facility to whom such approval responsibility has been delegated under local policy, usually the Chief of Pharmacy Services. A summary of the program and all materials must be provided well in advance of the proposed date so that a determination of the program's suitability can be made. Programs and materials must conform to the following guidelines:

(1) Industry sponsorship must be disclosed in the introductory remarks and in the announcement brochure. Sponsorship includes any contribution, whether in the form of staple goods, personnel, or financing, intended to support the program.

(2) Marketing activities cannot be conducted during an educational program.

(3) Promotional materials are not to be placed in any patient care area.

(4) Programs or materials must not offer patients an opportunity to participate in manufacturer sponsored programs and/or require the furnishing of Protected Health Information.

(5) Patient education materials must not contain the name or logo of the pharmaceutical manufacturer or be used for promotion of specific medications; unless the VA Pharmacy Benefits Management Service determines that the logo or name is inconspicuous and legal requirements (*e.g.,* trademark requirements) make their removal impractical. Even if such materials are approved by the VA National Formulary committee, the materials must otherwise be approved by the local facility in accordance with paragraph (d) of this section.

(6) Programs or materials regarding a new drug, drug-related supply, or a new therapeutic indication for a drug, which is already on the VANF but has not yet been reviewed by VA, must be clearly identified as such.

(7) Programs or materials focusing primarily on non-VANF drugs or drug-related supplies are discouraged; such programs or materials, as well as programs or materials regarding VANF drugs or drug-related supplies with restrictions, must be clearly identified as such.

(e) *Providing gifts, drugs or other promotional items to VA employees or facilities.*

(1) *General.* No sales representative may give, and no VA employee may receive, any item (including but not limited to promotional materials, continuing education materials, textbooks, entertainment, and gratuities) that exceeds the value permissible for acceptance under government ethical rules (5 CFR 2635.204(a)). However, such items may be donated to a medical center library or individual department for use by all employees, in accordance with local policies. Gifts of travel in support of VA staff official travel may be accepted by the Department subject to advance legal review in accordance with 31 U.S.C. 1353, 41 CFR part 304, and VA policy regarding such gifts.

(2) *Donations of drugs and drug-related supplies.* Drug samples and free drug-related supplies must be approved by the person at the medical facility to whom such responsibility is delegated under local policy, usually the Director. Information pertaining to the trial use of these drugs or drug-related supplies must be forwarded to the VISN Pharmacy Executive or VISN Formulary Committee. Drugs or drug-related supplies donated for the intended purpose of patient use must be delivered to the Office of the Chief of Pharmacy Services for proper storage, documentation and dispensing. These donated items must not be labeled "sample," "professional sample," or similar words, unless VA grants an

exception in the interests of patient care. Drug or supply samples may not be provided to VA staff for their personal use.

(3) *Donations of food.* Sales representatives may not provide food items of any type or any value to VA staff (including volunteers and without compensation employees) or bring food items into VA medical facilities for use by non-VA staff (*e.g.,* employees of affiliates). This constraint applies to all sales representatives who have business relationships with VA Clinical Services.

(f) *Conduct of sales representatives.* In addition to any other rules in this section, sales representatives (*i.e.,* promoters) of drugs and drug-related supplies must conform to the following:

(1) *Sales representatives must provide accurate information.* Sales representatives must ensure that all drugs or drug-related supplies are discussed, displayed and represented accurately, in accordance with any applicable Food and Drug Administration and VANF guidelines and restrictions.

(2) *Contacts are to be by appointment only.* In order to minimize the potential for disruption of patient care activities, a sales representative must schedule an appointment before each specific visit. Access to VA medical facilities by a sales representative without an appointment is not permitted under any circumstances. VA medical facilities may develop a list of individuals or departments that do not wish to be called-on by sales representatives. A sales representative must not attempt to make appointments with individuals or departments on the list. The list may be obtained at the local office of the Chief of Pharmacy Services.

(3) *Contacts with VA staff without an appointment.* A sales representative visiting a VA medical facility for a scheduled appointment may not initiate requests for meetings with other VA staff; however, sales representatives may respond to requests initiated by VA staff during the visit.

(4) *Paging VA employees.* The sales representative may not use the public address (paging) system to locate any VA employee. Contacts using the electronic paging system (beepers) are permissible only if specifically requested by the VA employee.

(5) *Marketing to students.* Sales representatives are prohibited from marketing to medical, pharmacy, nursing and other health profession students (including residents). Exceptions may be permitted when approved by, and conducted in the presence of, their clinical staff member.

(6) *Attendance at conferences.* A sales representative is not allowed to attend a medical center conference where patient-specific material is discussed or presented.

(7) *Patient care areas.* Sales representatives generally may not wait for scheduled appointments or make presentations in patient-care areas, but may briefly travel through them, when necessary, to meet in a staff member's office. Patient-care areas include, but are not limited to:

(i) Patient rooms and ward areas where patients may be encountered;

(ii) Clinic examination rooms;

(iii) Nurses stations;

(iv) Intensive care units;

(v) Operating room suites;

(vi) Emergency rooms;

(vii) Urgent care centers; and

(viii) Ambulatory treatment centers.

(g) *Failure to properly promote drugs or drug-related supplies within VA.*

(1) A sales representative's commercial visiting privileges at one or more VA medical facilities may be restricted by the written order of the director of the VA medical center of jurisdiction if the director determines the sales representative failed to comply with the requirements of this section. The director will notify the representative of the noncompliance and of the director's proposed action under paragraph (g)(3) of this section. The director will also notify the manager or other appropriate supervisor of the sales force if there have been instances of widespread misconduct by an individual, or by multiple representatives of the same sales force, and the director proposes to suspend or permanently revoke the sales force's commercial visiting privileges at one or more VA medical facilities. The notice will offer 30 days to provide a response; however, the proposed action will be enforced effective the date of the notice.

(2) At the end of the 30-day period for a response, or after the director receives a timely response, the director may, as appropriate to prevent future noncompliance, issue a written order suspending or permanently revoking the sales representative's or sales force's commercial visiting privileges, impose a lesser sanction, or decide that no further action is required. In determining the appropriate action, the director shall consider the requirements of this section, the circumstances of the improper conduct, any prior acts of misconduct by the same sales representative or sales force, any response submitted by the sales representative or sales force manager, and any prior orders issued or other actions taken with respect to similar acts of misconduct. Any final order issued by the director shall include a summary of the circumstances of the violation, a listing of the specific provisions of this section that the sales representative or sales force violated, and the bases for the director's determination regarding the appropriate remedial action.

(3) Actions that may be imposed under this section include limitation, suspension, or permanent revocation of commercial visiting privileges at one or more VA medical facilities. Instances of widespread misconduct by an individual or multiple sales representatives may result in the imposition of a VISN-wide or VA-wide limitation, suspension, or revocation of commercial visiting privileges of the entire sales force of a given manufacturer, if necessary to prevent further noncompliance. The director will provide the sales representative or sales force manager written notice of any final order issued under this section.

(4) Notice concerning a final order suspending or permanently revoking an entire sales force's commercial visiting privileges shall include specific notice concerning the right to appeal the director's order to the Under Secretary for Health. The sales force manager or other corporate representative may request the Under Secretary's review within 30 days of the date of the director's order by submitting a written request to the director. The director shall forward the initial notice, any response, the final order, and the request for review to the Under Secretary for a final VA decision. VA will enforce the director's order while it is under review by the Under Secretary. The director will provide the individual who made the request written notice of the Under Secretary's decision.

(Authority: 38 U.S.C. 501)

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 62

RIN 2900–AN53

Supportive Services for Veteran Families Program

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: This proposed rule would establish regulations concerning the Supportive Services for Veteran Families Program (SSVF Program) of the Department of Veterans Affairs (VA). This proposed rule is necessary to implement the provisions of section 604 of the Veterans' Mental Health and Other Care Improvements Act of 2008. The purpose of the SSVF Program is to provide supportive services grants to private non-profit organizations and consumer cooperatives who would coordinate or provide supportive services to very low-income veteran families who are residing in permanent housing, are homeless and scheduled to become residents of permanent housing within a specified time period, or after exiting permanent housing, are seeking other housing that is responsive to such very low-income veteran family's needs and preferences. The new SSVF Program is within the continuum of VA's homeless services programs.

DATES: Comments on the proposed rule, including comments on the information collection provisions, must be received on or before June 4, 2010.

ADDRESSES: Written comments may be submitted through *http://www.Regulations.gov;* by mail or hand delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to "RIN 2900–AN53." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 (this is not a toll-free number) for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *http://www.Regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Vincent Kane, Supportive Services for Veteran Families Program Office (116), National Center on Homelessness Among Veterans, c/o Philadelphia VA Medical Center, 3900 Woodland Avenue, Philadelphia, PA 19104, (202) 273–7462 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: Section 604 of the Veterans' Mental Health and Other Care Improvements Act of 2008, Public Law 110–387 (the Act), codified at 38 U.S.C. 2044, directed the Secretary of VA (Secretary) to provide financial assistance to eligible entities to provide supportive services to very low-income veteran families who are occupying permanent housing. This proposed rule would establish regulations concerning the SSVF Program and is necessary to implement section 604 of the Act.

For organization and clarity of implementation, the proposed rule sets forth a new 38 CFR part 62. The proposed rule would establish regulations authorizing VA to award supportive services grants to private non-profit organizations and consumer cooperatives, who would provide or coordinate the provision of supportive services to very low-income veteran families who: (i) Are residing in permanent housing, (ii) are homeless and scheduled to become residents of permanent housing within a specified time period; or (iii) after exiting permanent housing, are seeking other housing that is responsive to such very low-income veteran family's needs and preferences.

VA has several programs that offer care to eligible homeless veterans, such as the Health Care for Homeless Veterans (HCHV) Program, the Grant and Per Diem (GPD) Program, the Residential Rehabilitation and Treatment Programs (RRTP), the Homeless Dental Program, and the Housing and Urban Development—VA Supported Housing (HUD–VASH Program). The SSVF Program is unique among the other VA programs because of the population it serves and the wide range of supportive services it provides to that population. For example, unlike other VA programs, the SSVF Program permits supportive services to be provided to veterans and their family members. (While the GPD program authorizes certain services for minor dependents of women veterans, it does not generally authorize the provision of supportive services to family members). Subject to SSVF Program limitations, these very low-income veteran families could be residing in permanent housing or be homeless. A broad range of supportive services assist participants to obtain housing stability, such as case management, assist participants to obtain any VA, Federal, State, local, or tribal benefits for which they may be eligible, and provide temporary financial assistance.

The SSVF Program will benefit very low-income veteran families by helping them to achieve housing stability. In particular, the SSVF Program will aim to prevent very low-income veteran families from becoming homeless and assist those very low-income veteran families who are homeless with rapid re-housing. The SSVF Program will assist participants in obtaining the skills and resources necessary to maintain long-term housing stability.

Content of Proposed Rule

62.1 Purpose

Proposed § 62.1 sets forth the purpose of the SSVF Program. Consistent with the Act (38 U.S.C. 2044), the proposed rule states that the purpose of the SSVF Program is to provide supportive services grants to eligible entities to facilitate the provision of supportive services to very low-income veteran families who are occupying permanent housing.

62.2 Definitions

Proposed § 62.2 contains definitions for key terms that would be used in part 62 and Notices of Fund Availability. Although the proposed rule lists definitions in alphabetical order, this notice discusses the definitions as follows:

(a) Definitions that are critical for understanding the SSVF Program; (b) Definitions that are included to provide clarity; and (c) Definitions that are based upon existing VA regulations or statutes.

Definitions That Are Critical for Understanding the SSVF Program

In accordance with the Act (38 U.S.C. 2044(f)(2)), proposed § 62.2 defines the term "eligible entity" as a private non-profit organization or consumer cooperative, which in turn are separately defined in proposed § 62.2.

The proposed definition of "veteran family" is consistent with the definition provided in the Act (38 U.S.C. 2044(f)(7)). The proposed rule defines a veteran family as either a single veteran or a family in which the head of household, or the spouse of the head of household, is a veteran.

Under the proposed rule, to be eligible for supportive services, a veteran family must be considered a "very low-income veteran family." Consistent with the Act (38 U.S.C. 2044(f)(6)), proposed § 62.2 defines a very low-income veteran family as a veteran family whose annual income does not exceed 50 percent of the median income for an area or community. This is subject to adjustment by VA in the Notice of Fund Availability. A veteran family's annual income will be determined in accordance with the income criteria for programs under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f) as found in the Department of Housing and Urban Development regulation 24 CFR 5.609. VA has

determined that, unless stated otherwise in the Notice of Fund Availability, the income limits and area or community designations most recently published by the Department of Housing and Urban Development for programs under section 8 of the United States Housing Act of 1937 will be used to determine the median income for an area or community.

Under 38 U.S.C. 2044(f)(4), "permanent housing" is defined as "community-based housing without a designated length of stay." The term "permanent housing" is defined in proposed § 62.2 consistent with the statute, but clarifying language is included in the proposed rule to explain that under our interpretation of the statute, permanent housing includes, but is not limited to, a house or apartment with a month-to-month or annual lease term, or home ownership. Permanent housing is not intended to include certain types of institutional housing that generally involve a designated length of stay, such as imprisonment or detainment pursuant to Federal or State law, which are not considered "community-based housing" under industry standards or common parlance.

The proposed rule assigns a definition to the phrase "occupying permanent housing," as set forth in proposed § 62.11(a).

"Supportive services" are defined in the proposed rule as outreach services, as specified under proposed § 62.30; case management services, as specified under proposed § 62.31; assisting participants to obtain VA benefits, as specified under proposed § 62.32; assisting participants in obtaining and coordinating other public benefits, as specified under proposed § 62.33; and other services, as specified under proposed § 62.34. This proposed definition is derived from the description of supportive services provided in the Act (38 U.S.C. 2044(b)).

The proposed rule defines the term "participant" as those single veterans and veteran families who qualify for and are receiving supportive services from a private non-profit organization or consumer cooperative awarded a supportive services grant.

The proposed rule defines the term "homeless" by restating the definition from the Act (38 U.S.C. 2044(f)(3)), which gives the term the same "meaning given that term in section 103 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302)."

Definitions That Are Included To Provide Clarity

The terms "applicant," "emergency supplies," "grantee," "Notice of Fund Availability," "subcontractor," "supportive services grant," and "supportive services grant agreement" are included in the proposed rule to provide clarity. The proposed definitions are based on a plain language understanding of those terms.

Definitions That Are Based Upon Existing VA Regulations or Statutes

The terms "area or community," "date of completion," "disallowed costs," "State," "suspension," "third party in-kind contributions," "VA," "veteran," and "withholding" are defined by VA in the Homeless Providers Grant and Per Diem Program (38 CFR 61.1); in VA's regulations regarding uniform requirements for grants and agreements with institutions of higher education, hospitals, and other non-profit organizations (38 CFR 49.2); or the definitions in 38 U.S.C. 101. These existing definitions are used in the proposed rule because they are understood by VA and its grantees, which would simplify the implementation of this new program.

Some of these existing definitions would be modified for use in the SSVF Program. For example, "area or community" is broadened in the proposed rule to include tribal reservations, because the Act (38 U.S.C. 2044(a)(5)) requires the equitable distribution of supportive services grants across geographic regions, including rural communities and tribal lands. To specifically acknowledge the proposed rule's termination and closeout provisions, the term "date of completion" includes the date that a supportive services grant is terminated.

62.10 Supportive Services Grants—General

Under proposed § 62.10, at least 90 percent of supportive services grant funds would need to be used by grantees to provide and coordinate the provision of supportive services to very low-income veteran families occupying permanent housing; a maximum of 10 percent of supportive services grant funds could be used for administrative costs identified in proposed § 62.70(e). In accordance with the intent of the Act (38 U.S.C. 2044) and VA's goals for the SSVF Program, VA proposes that the vast majority of supportive services grant funds (90 percent) be used to serve very low-income veteran families occupying permanent housing. VA expects that 10 percent would be a reasonable maximum for administrative costs associated with a supportive services grant, and any additional funds required by grantees for administration should be provided by non-VA funds. This percentage split (90/10) is based upon VA's past experience administering similar programs and VA's goals for the SSVF Program.

62.11 Participants—Occupying Permanent Housing

Proposed § 62.11 provides that a very low-income veteran family will be considered to be occupying permanent housing, and thereby eligible to receive supportive services from a grantee as a participant subject to proposed § 62.35, if such family meets the conditions of any one of the three categories described in proposed § 62.11(a)(1)–(3).

Consistent with the Act (38 U.S.C. 2044(b)(1)), proposed § 62.11(a)(1) defines the first category of very low-income families occupying permanent housing as "residing in permanent housing."

Consistent with the Act (38 U.S.C. 2044(b)(2)), proposed § 62.11(a)(2) defines the second category of families occupying permanent housing as being homeless and scheduled to become a resident of permanent housing within 90 days pending the location or development of housing suitable for permanent housing. Development of permanent housing includes, but is not limited to, the construction, rehabilitation or modification of permanent housing.

Consistent with the Act (38 U.S.C. 2044(b)(3)), proposed § 62.11(a)(3) defines the third category of families occupying permanent housing as having exited permanent housing within the previous 90 days and seeking other housing that is responsive to the very low-income veteran family's needs and preferences.

Proposed § 62.11(b) authorizes a grantee to reclassify a participant's classification for occupying permanent housing if the participant's housing changes while receiving supportive services. The SSVF Program is designed to ensure that very low-income veteran families who are transitioning (including, but not limited to, transitioning from homelessness to permanent housing and transitioning between various classifications of housing) maintain eligibility to receive supportive services through the SSVF Program. For example, if a very low-income veteran family who is homeless consistent with proposed § 62.11(a)(2) moves into permanent housing, such family would then be reclassified under proposed § 62.11(a)(1). By reclassifying

the participant under proposed § 62.11(a)(1), the participant would remain eligible to receive supportive services from a grantee, and the limitations to which the participant was subject when classified under proposed § 62.11(a)(2) would no longer apply. Permitting participants to be reclassified if their housing changes is consistent with the purpose of the Act and the SSVF Program's focus on promoting housing stability.

62.20 Applications for Supportive Services Grants

Proposed § 62.20(a) would require applicants to submit a complete supportive services grant application package and identify the items that would be included in such supportive services grant application package. The items listed are derived from the Act (38 U.S.C. 2044(c)) and the application requirements prescribed for VA's Homeless Providers Grant and Per Diem Program (38 CFR 61.11) and are designed to ensure that VA can fully evaluate the ability of applicants to achieve the goals of the SSVF Program.

Proposed § 62.20(b) would authorize grantees to submit an application for renewal of a supportive services grant if the grantee's program will remain substantially the same. By allowing grantees to submit a supportive services grant renewal application, grantees would be able to efficiently seek additional supportive services grant funds for a subsequent period, subject to the availability of VA funds, without a lapse in the provision of supportive services to participants.

Proposed § 62.60(c) would allow VA to request other information or documentation related to a supportive services grant application in the event that particular information not set forth in the supportive services grant application is needed for VA to fully consider the applicant or grantee, as applicable.

62.21 Threshold Requirements Prior to Scoring Supportive Services Grant Applicants

The Act (38 U.S.C. 2044(c)(3)) requires VA to establish criteria for the selection of eligible entities to be provided supportive services grants. Proposed § 62.21 contains minimum threshold requirements that each applicant would be required to satisfy before VA would score the applicant. The threshold requirements are intended to be an administrative checklist with which applicants would confirm compliance prior to submitting a supportive services grant application. For example, if an applicant is not an eligible entity, if the application is not completed in all parts, or if the applicant is in default by failing to meet the requirements for any previous Federal assistance, VA would not process the application.

The threshold requirements in proposed § 62.21 are consistent with the threshold requirements in VA's Homeless Providers Grant and Per Diem Program (38 CFR 61.12). In administering that program, VA has found that screening applications to identify those that do not fulfill the threshold requirements enables VA to devote its resources to evaluating qualified supportive services grant applicants.

62.22 Scoring Criteria for Supportive Services Grant Applicants

A limited amount of funds are available for VA to distribute through the SSVF Program. In accordance with the Act (38 U.S.C. 2044(c)(3)) and because the number of applicants may exceed available funds or VA may have more funds than qualified applicants, VA has established scoring criteria for awarding supportive services grants. Utilization of the scoring criteria would allow VA to distribute supportive services grants consistent with Congressional intent and VA's goals for the SSVF Program.

Proposed § 62.22 describes the scoring criteria that VA proposes to use to score applicants fulfilling the threshold requirements. The scoring criteria are derived from VA's experience with programs such as the Homeless Providers Grant and Per Diem Program (38 CFR 61.13) and the Loan Guarantee for Multifamily Transitional Housing Program (38 U.S.C. 2051 *et seq.*). The proposed categories are weighted according to their likelihood of impacting a grantee's successful development and operation of a supportive services grant program. For example, the background, qualifications, experience, and past performance category is assigned the highest point value because applicants, and any identified subcontractors, with both experience implementing similar programs and strong staff qualifications would be most likely to develop and operate effective programs designed to meet the needs of very low-income veteran families and expend supportive services grant funds in an effective and efficient manner. In contrast, the area or community linkages and relations category is assigned 10 points. VA assigns point value to this category because VA recognizes the importance of an applicant's past working relationships, local presence, and knowledge, and would reward applicants that have established such relationships or have such knowledge. However, VA does not consider this category to be as effective an indicator of program success as the background, qualifications, experience, and past performance category. This is because, if necessary, area or community linkages can be developed over the course of normal operations after the applicant is awarded a supportive services grant.

When scoring applicants, VA proposes to award points to applicants who exceed the 10 percent cost sharing requirement in proposed § 62.26, as described in proposed § 62.22(d)(3). The Notice of Fund Availability would state the maximum percentage for which the full amount of points for this criterion would be awarded. For example, the Notice of Fund Availability could state that applicants matching a maximum 25 percent of the supportive services grant amount would receive the maximum amount of points for this criterion; therefore, applicants matching 25 percent of the supportive services grant amount would receive the same amount of points for this criterion as applicants matching 100 percent of the supportive services grant amount. VA wishes to reward those applicants demonstrating a match higher than 10 percent of the supportive services grant amount, but VA also recognizes that applicants would have varying amounts of resources available for cash or in-kind contributions.

62.23 Selecting Applicants To Receive Supportive Services Grants

Proposed § 62.23 describes the process VA proposes using to select applicants for supportive services grants. This process is similar to the selection process VA uses in the Homeless Providers Grant and Per Diem Program (38 CFR 61.14), but also includes a preference and an equitable distribution requirement set forth in the Act (38 U.S.C. 2044(a)(4) and 38 U.S.C. 2044(a)(5)).

VA would first group applicants by funding priorities, if any such priorities are set forth in the Notice of Fund Availability. VA would then score applicants using the criteria in proposed § 62.22 and rank applicants who receive at least the minimum amount of total points and points per category set forth in the Notice of Fund Availability, within their respective funding priority group, if any. Applicants would be ranked in order from highest to lowest scores, within their respective funding priority group, if any.

Although VA would use the applicant's ranking as the primary basis

for selection, in accordance with the Act (38 U.S.C. 2044(a)(4) and 38 U.S.C. 2044(a)(5)), VA would: (1) Give preference to applicants that provide or coordinate the provision of supportive services for very low-income veteran families transitioning from homelessness to permanent housing, and (2) ensure, to the extent practicable, that the supportive services grants are equitably distributed across geographic regions, including rural communities and tribal lands. The supportive services grant application would require applicants to identify the target populations and the area or community that the applicant proposes to serve. VA would use this information in the selection of grantees to ensure VA is complying with the Act's requirements for distribution of supportive services grants.

Subject to the preference and equitable distribution requirement described in proposed § 62.23(d), VA would fund the highest-ranked applicants for which funding is available, within the highest funding priority group, if any. Under proposed § 62.40, VA would be able to choose to include funding priorities in the Notice of Fund Availability in order to meet the mandates of the Act (38 U.S.C. 2044) and VA goals for the SSVF Program. If funding priorities have been established, to the extent funding is available and subject to proposed § 62.23(d), VA would select applicants in the next highest funding priority group based on their rank within that group.

62.24 Scoring Criteria for Grantees Applying for Renewal of Supportive Services Grants

Proposed § 62.24 describes the criteria VA would use to score grantees applying for renewal of a supportive services grant. Utilizing criteria specific to renewal applications would help VA more appropriately evaluate grantees who are already operating programs. Accordingly, as described in proposed § 62.24, VA would award points to a grantee seeking renewal based upon the grantee's program's success, cost-effectiveness, and compliance with VA goals and requirements.

62.25 Selecting Grantees for Renewal of Supportive Services Grants

Proposed § 62.25 describes the process VA proposes using to select grantees applying for renewal of supportive services grants. This is a simplified version of the process used to initially award supportive services grants.

In order to be considered for renewal, proposed § 62.25(a) requires grantees to continue to meet the threshold requirements applicable to applicants in proposed § 62.21. VA would score grantees using the criteria in proposed § 62.24 and rank grantees who receive at least the minimum amount of total points and points per category set forth in the Notice of Fund Availability. In accordance with proposed § 62.25(c), VA would fund the highest-ranked grantees for which funding is available. The amount of supportive services grant funds awarded to a grantee would be dependent upon the grantee's request, the availability of funds, and any requirements described in the Notice of Fund Availability.

62.26 Cost Sharing Requirement

Proposed § 62.26 requires grantees to match a minimum of 10 percent of the amount of VA-provided supportive services grant funds with cash resources or third party in-kind contributions from non-VA sources. This requirement is intended to demonstrate the grantee's commitment to the SSVF Program and ensure continuity of program operations and assistance to participants. After reviewing comparable programs' cost sharing requirements and acknowledging that grantees will have varying amounts of resources, VA determined that 10 percent would be an appropriate cost sharing requirement.

62.30 Supportive Service: Outreach Services

Proposed § 62.30 prescribes outreach services, and it is the first of five sections describing the types of supportive services that grantees would provide through the SSVF Program. Outreach is critical to the success of the SSVF Program. Outreach would help ensure that supportive services are provided to very low-income veteran families occupying permanent housing who are difficult to locate or serve, such as those very low-income veteran families who live in rural areas, who are not already receiving VA benefits, or who reside in permanent housing but are at risk of losing such housing. Working with local facilities and agencies would help grantees assist participants in obtaining benefits of which the participants may not be aware. In addition, contact with local groups who serve veterans would help grantees identify additional participants.

62.31 Supportive Service: Case Management Services

To effectively assist participants in achieving housing stability, grantees would need to provide case management services. Accordingly, proposed § 62.31 includes a listing of tasks to ensure that applicants, grantees, and VA share the same understanding of "case management services." The proposed description of case management services is based on the definitions of case management services provided in other Federal programs, such as the Housing and Urban Development–Veterans Affairs Supported Housing (HUD–VASH) Program, the Department of Housing and Urban Development's Congregate Housing Services Program (24 CFR 700.105), and the Department of Health and Human Services' Medicare and Medicaid Services Program (42 CFR 440.169).

62.32 Supportive Service: Assistance in Obtaining VA Benefits

Grantees would provide an additional means for VA to notify eligible veteran families of available VA benefits. Consequently, and in accordance with the Act (38 U.S.C. 2044(b)(1)(C)), proposed § 62.32 requires grantees to assist participants to obtain any benefits from VA for which the participants are eligible. In light of 38 U.S.C. ch. 59, as implemented in 38 CFR part 14, VA does not interpret the Act to allow grantees to represent veterans in benefit claims before VA. Nor does VA interpret the Act as requiring that grantees become recognized organizations pursuant to 38 U.S.C. 5902 or that their employees or members become accredited service organization representatives, claims agents, or attorneys. Rather, benefit claims assistance by grantees may include providing information about available benefits and helping veterans locate a recognized veterans service organization or accredited individual and other services short of actual representation before VA, unless an individual employee or agent of the grantee is appropriately accredited pursuant to 38 CFR 14.629.

62.33 Supportive Service: Assistance in Obtaining and Coordinating Other Public Benefits

VA would expect grantees to maximize the number of participants who will be served. Grantees may be able to directly provide many necessary supportive services; however, in some situations it would be more efficient for grantees to provide a referral for participants to obtain services provided by another Federal, State, or local agency or an eligible entity in the area or community served by the grantee. Accordingly, and in accordance with

the Act (38 U.S.C. 2044(b)(1)(D)), proposed § 62.33 requires grantees to assist participants to obtain, and coordinate the provision of, other public benefits that are being provided by Federal, State, local, or tribal agencies, or any eligible entity in the area or community served by the grantee.

Proposed § 62.33 lists each of the examples of public benefits set forth in the Act (38 U.S.C. 2044(b)(1)(D)) and includes a definition for each listed public benefit. Most of the proposed definitions are derived from existing Federal programs. The proposed definitions are provided to ensure that applicants and grantees share the same understanding as VA of what constitutes each of the listed public benefits.

The Act (38 U.S.C. 2044(b)(1)) broadly defines supportive services as those "provided by an eligible entity or subcontractor of an eligible entity that address the needs of very low-income veteran families occupying permanent housing, including" services specified under the Act (38 U.S.C. 2044(b)(1)(A)–(D)). The use of "including" indicates that the list of services which follows is not intended to be exhaustive. Hence, proposed § 62.33(d)(1)–(2) and proposed § 62.33(h)(2) permit direct payments from grantees for transportation and child care needs. VA has defined such payments as supportive services necessary to address the needs of very low-income veteran families occupying permanent housing. VA recognizes that the availability of adequate transportation and child care are important for obtaining and maintaining employment, and, therefore, housing stability. Accordingly, under proposed § 62.33(d), grantees are authorized to provide temporary transportation services to participants if the grantee determines such assistance is necessary. Public transportation is generally less expensive than maintenance of private vehicles and may be more sustainable by both grantees and participants on a long-term basis. Consequently, the preferred method of providing transportation services under a supportive services grant would be the provision of tokens, vouchers, or other appropriate instruments to participants for use on public transportation. However, if an applicant determines that public transportation options are not sufficient within the area or community to be served, such as in a rural community, in the applicant's supportive services grant application, the applicant would be able to include costs related to the applicant's lease of vehicle(s) for the purpose of providing transportation services to participants.

Proposed § 62.33(h) authorizes grantees to make payments on behalf of a participant to a State-licensed facility providing child care services. Because the grantee's payment for child care services is intended to be temporary, prior to making child care payments on behalf of a participant, under the proposed rule, the grantee must help the participant develop a reasonable plan to address the participant's future ability to pay for child care services and assist the participant to implement such plan. If this plan cannot reasonably be developed, the proposed rule provides that supportive services grant funds should not be expended on behalf of a participant for child care services and other options should be considered by the grantee and the participant. In accordance with the purpose of the SSVF Program, grantees would be limited to providing payments for child care services with supportive services grant funds for a maximum of 2 months in a calendar year. The 2-month limitation is designed to prevent child care services from consuming a disproportionate amount of supportive services grant funds. Grantees should provide participants with information on other available programs if long-term child care assistance is needed.

62.34 Other Supportive Services

The Act (38 U.S.C. 2044(b)(1)) broadly defines supportive services as those "provided by an eligible entity or subcontractor of an eligible entity that address the needs of very low-income veteran families occupying permanent housing, including" services specified under the Act (38 U.S.C. 2044(b)(1)(A)–(D)). The use of "including" indicates that the list of services which follows is not intended to be exhaustive. Hence, proposed § 62.34 defines the payment of temporary financial assistance in certain instances as a supportive service that VA has determined is necessary to address the needs of very low-income veteran families occupying permanent housing.

To prevent imminent homelessness or assist currently homeless very low-income veteran families who are scheduled to become residents of permanent housing within 90 days pending the location or development of suitable permanent housing, it may be necessary in certain circumstances for the grantee to assist the participant in paying certain expenses. Accordingly, VA proposes classifying the following as a supportive service: Temporary financial assistance paid directly to a third party on behalf of a participant for rental payments, penalties, or fees; utility payments; security deposits; utility deposits; moving costs; and emergency supplies.

For example, repeated failure to pay rent often leads to eviction, leaving a veteran family to contend with homelessness in addition to the initial lack of needed resources. A grantee's provision of temporary financial assistance for rent, as provided in proposed § 62.34, may be necessary to stabilize and maintain the participant's occupancy in permanent housing while the participant locates other resources that will help achieve housing stability on a long-term basis. Similarly for the reasons discussed in connection with proposed § 62.33, it may be necessary for a grantee to provide temporary assistance for transportation services or child care to maintain a participant's occupancy in permanent housing.

Grantees would be able to provide this type of temporary financial assistance if the grantee can reasonably determine that the payment by the grantee for the item requested would help the participant remain in permanent housing or obtain permanent housing as scheduled; if this determination cannot be reached, the grantee would assist the participant to obtain other types of available assistance.

Similar to the child care payments discussed above, as a condition of the grantee's provision of temporary financial assistance for rental or utility fee payments, rental or utility deposits, and moving costs, the proposed rule requires the grantee to help the participant develop and implement a plan to address the participant's future housing stability. This requirement would limit the expenditure of supportive services grant funds to situations where the outcome would be housing stability for the participant.

To the extent that proposed § 62.34 authorizes the provision of temporary financial assistance on behalf of a participant, it is generally on a temporary or infrequent basis. The proposed rule includes time restrictions for the provision of temporary financial assistance because the SSVF Program is not a long-term financial assistance program; instead, if a participant needs long-term financial assistance, the grantee would have a duty to connect the participant with other programs providing such assistance. For example, rental assistance is limited to 4 months during a 3-year period, and moving costs may only be paid once in 3 years.

Proposed § 62.34 contains additional restrictions. For example, with respect to temporary rental payments described in proposed § 62.34(a), rent payments would need to meet a "rent

reasonableness" standard, which is similar to the standard used by the Department of Housing and Urban Development in certain programs. Similarly, rental assistance in the form of payment of penalties or fees would need to be reasonable and required to be paid by the participant under an existing lease or court order. Further, grantees cannot provide temporary financial assistance on behalf of a participant for the same period of time and for the same cost types that are being provided through another Federal, State or local program. A restriction on the provision of "emergency supplies" is provided in the proposed rule to ensure that grantees understand that such assistance is intended to assist in the case of a temporary emergency where supplies are necessary for the participant's life or safety, and is not intended to permit regular or ongoing aid.

Under proposed § 62.34(f), VA may identify additional services in future Notices of Fund Availability, and grantees may request VA's approval to provide a supportive service that is not listed in the proposed rule or future Notices of Fund Availability.

62.35 Limitations on and Continuations of the Provision of Supportive Services to Certain Participants

Proposed § 62.35 discusses the provision of supportive services to certain categories of participants (as described in proposed §§ 62.11(a)(2) and 62.11(a)(3)) and would authorize the continuation of supportive services to a veteran's family member(s) in the event of absence or death of the veteran.

The Act (38 U.S.C. 2044(b)(2)) authorizes the provision of supportive services to a participant who is "homeless and scheduled to become a resident of permanent housing within 90 days pending the location or development of housing suitable for permanent housing." VA recognizes that a participant scheduled to move into permanent housing may encounter unexpected delays, such as delays relating to construction, housing application processing, or other circumstances beyond the participant's control. The proposed rule would not require a grantee to stop providing supportive services to a participant in the event the participant does not become a resident of permanent housing within the original 90-day period. In such instances, proposed § 62.35(a) authorizes the grantee to continue providing supportive services to the participant beyond the original 90-day period under proposed § 62.11(a)(2) so long as the participant continues to meet the conditions of proposed § 62.11(a)(2) by being homeless and scheduled to become a resident of permanent housing within 90 days. This approach is consistent with the SSVF Program's goal of assisting participants to achieve housing stability and the Act's (38 U.S.C. 2044(a)(4)) requirement for VA to preference entities serving very low-income veteran families transitioning from homelessness to permanent housing.

In accordance with the Act (38 U.S.C. 2044(b)(3)), proposed § 62.35(b)(1) limits the provision of supportive services to participants classified under proposed § 62.11(a)(3) until the earlier of (a) the participant's commencement of other housing services adequate to meet the participant's needs, or (b) 90 days from the date the participant exits permanent housing. In accordance with the Act (38 U.S.C. 2044(b)(3)), proposed § 62.35(b)(2) requires that all supportive services provided to participants classified under proposed § 62.11(a)(3) be designed to support such families in their choice to transition into housing that is responsive to their individual needs and preferences.

Since the SSVF Program serves both veterans and their families, consistent with the purposes of the Act, proposed § 62.35(c) requires grantees to establish a reasonable grace period during which a veteran's family member(s) may continue to receive supportive services if the veteran becomes absent from the household or dies. This grace period would allow the veteran's family member(s) to continue receiving supportive services for a maximum of 1 year from the date of the absence or death of the veteran, subject to the requirements of proposed § 62.35(a) and (b). Participants could be harmed by the sudden withdrawal of supportive services at a time when the participant may most need such supportive services. The grace period would allow the grantee discretion in establishing the duration of the grace period because the grantee would be most familiar with the participant's individualized needs.

If a participant becomes ineligible to receive supportive services for any of the reasons described in proposed § 62.35, proposed § 62.35(d) requires the grantee to provide the participant with information on other available programs or resources.

62.36 General Operation Requirements

To ensure that grantees are expending supportive services grant funds on eligible participants, proposed § 62.36(a) requires grantees to certify the eligibility of each participant for supportive services and classify the participant under one of the categories set forth in proposed § 62.11(a). This certification and classification must occur at least once every 3 months. In addition, grantees would be required to maintain the confidentiality of records kept on participants, as required by proposed § 62.36(b). Pursuant to proposed § 62.36(c), grantees would be required to notify participants of satisfaction surveys at certain times in order to assist VA to evaluate grantees' performance and participants' satisfaction with the supportive services they receive. To encourage grantees to leverage other financial resources to ensure continuity of program operations and assistance to participants, proposed § 62.36(d) requires grantees to regularly assess how supportive services grant funds can be used in conjunction with other available funds and services.

62.37 Fee Prohibition

In accordance with the intent the Act, VA proposes that all very low-income veteran families be eligible to receive supportive services under the SSVF Program, regardless of whether such very low-income veteran family is able to pay for such services. Accordingly, proposed § 62.37 prohibits grantees from charging a fee to very low-income veteran families for providing supportive services that are funded with amounts from a supportive services grant or cost-sharing funds. However, as described in proposed §§ 62.33(h) and 62.34, grantees would be permitted to require a participant to share in the cost of any rental or utility fee payment, rental or utility deposits, moving costs, or child care costs which would be paid by the grantee on behalf of the participant.

62.40 Notice of Fund Availability

Similar to the existing process in VA's Homeless Providers Grant and Per Diem Program (38 CFR 61.60), in order to notify the public when funds are available for supportive services grants, in accordance with proposed § 62.40, VA would publish a Notice of Fund Availability in the **Federal Register** identifying such items as the location for obtaining supportive services grant application packages; the date, time, and place for submitting completed supportive services grant applications; the estimated amount and type of funding available, such as the amount of funds available for initial and renewal supportive services grants; the length of term for supportive services grant payments; and other information necessary for the supportive services grant application process as determined

by VA. The Notice of Fund Availability may require applicants to submit evidence of financial responsibility, such as financial statements and an Internal Revenue Service certification, and VA would use this information to confirm that applicants are financially responsible to receive funds under the SSVF Program.

In addition, under the proposed rule, the Notice of Fund Availability may include a minimum number of total points and points per category that an applicant or grantee, as applicable, must receive in order for a supportive services grant to be funded in order to provide a minimal baseline which applicants or grantees, as applicable, must meet. Under the proposed rule, VA would be able to choose to include funding priorities in the Notice of Fund Availability in order to meet the mandates of the Act (38 U.S.C. 2044) and VA goals for the SSVF Program. For example, VA may decide to award a certain amount of available supportive services grant funds to applicants in certain areas or communities in order to fulfill the Act's requirement to equitably distribute supportive services grants across geographical regions (38 U.S.C. 2044(a)(5)). VA may limit the amount of supportive services grant funds for specific supportive services in the Notice of Fund Availability to ensure that grantees do not expend funds in a manner inconsistent with VA's goals for the SSVF Program. For example, the Notice of Fund Availability may prohibit a grantee from using more than 10 percent of the supportive services grant funds for temporary financial assistance; this requirement would ensure that the grantee has sufficient funds to provide the other required supportive services. Whether VA continues to fund any particular grantee from one year to the next will depend upon the priorities announced in the Notice of Fund Availability. For example, VA may decide to award a certain amount of available supportive services grant funds to renewal applicants.

VA would also plan to notify interested parties of the availability of supportive services grant funds on the appropriate VA Web site.

62.50 Supportive Services Grant Agreements

Upon selection, proposed § 62.50 requires the applicant or grantee, as applicable, to execute a supportive services grant agreement with VA confirming compliance with all requirements of the proposed rule and other terms and conditions required by VA. The supportive services grant agreement would be enforceable against the grantee, which would provide VA with assurance that the grantee would use the supportive services grant funds in the manner described in the supportive services grant application and in accordance with the requirements of the proposed rule.

62.51 Payments Under the Supportive Services Grant

The Act (38 U.S.C. 2044(a)(3)(B)) authorizes VA to establish intervals of payment for the administration of supportive services grants and establish a maximum amount to be awarded, in accordance with the supportive services being provided and their duration. Proposed § 62.51 notifies grantees that information regarding the timeframe and manner of payment of supportive services grants would be described in the Notice of Fund Availability. Including these requirements in the Notices of Fund Availability allows VA flexibility to determine the appropriate time and manner of payment of supportive services grants during each funding cycle.

62.60 Program or Budget Changes and Corrective Action Plans

Proposed § 62.60(a), which is derived from VA's Homeless Providers Grant and Per Diem Program (38 CFR 61.62), would require grantees to receive prior approval from VA in the form of an amendment to the supportive services grant agreement before any significant change to the grantee's program is implemented. Examples of significant changes would include: A change in the grantee or any subcontractors identified in the supportive services grant agreement, a change in the area or community served by the grantee, additions or deletions of supportive services provided by the grantee, a change in the category of participants to be served, and a change in budget line items that are more than 10 percent of the total supportive services grant award. The grantee would be obligated to implement the agreed upon program until such time, if any, that VA consents to a significant change.

The Act (38 U.S.C. 2044(a)(7)) permits VA to require grantees to submit a report that describes the projects carried out using supportive services grant funds. Proposed § 62.60(b) provides that if, on a quarterly basis, actual supportive services grant expenditures vary from the amount disbursed to a grantee for that same quarter or actual supportive services vary from the grantee's program description provided in the supportive services grant agreement, VA may require the grantee to submit a corrective action plan to demonstrate how the grantee would adjust to meet the requirements of the supportive services grant agreement in accordance with proposed § 62.60(b). The corrective action plan would explain how a grantee would adjust its behavior in order to comply with the requirements of the supportive services grant agreement, and the correction may involve an amendment as described under proposed § 62.60(a).

The requirements in proposed § 62.60 would help VA maintain control over the quality of the supportive services provided by grantees and ensure that supportive services grant funds are not misused.

62.61 Procedural Error

Similar to the existing process in VA's Homeless Providers Grant and Per Diem Program (38 CFR 61.63), proposed § 62.61 would authorize VA to select an applicant for available funding, based on the applicant's previously submitted application, if that applicant is not selected because of VA's procedural error. This is intended to ease the administrative burden on applicants and, under the proposed rule, may be used in situations where there is no material change in the application that would have resulted in the applicant's selection.

62.62 Religious Organizations

Proposed § 62.62, which describes that religious or faith-based organizations are eligible for supportive services grants and contains certain conditions on the use of supportive services grant funds as it relates to religious activities, is similar to the language used in the regulations for VA's Homeless Providers Grant and Per Diem Program (38 CFR 61.64). This language is included in the proposed rule because VA expects that religious or faith-based organizations may apply for supportive services grants.

62.63 Visits To Monitor Operations and Compliance

Proposed § 62.63 provides VA with the right, at all reasonable times, to make visits to all grantee locations where a grantee is using supportive services grant funds in order to review grantee accomplishments and management control systems and to provide such technical assistance as may be required. VA may also conduct inspections of all program locations and records of a grantee at such times as are deemed necessary to determine compliance with the provisions of this part. In the event that a grantee delivers services in a participant's home, or at a

location away from the grantee's place of business, VA may accompany the grantee. If the grantee's visit is to the participant's home, VA will only accompany the grantee with the consent of the participant. These provisions are critical for VA oversight over supportive services grants.

62.70 Financial Management and Administrative Costs

Proposed § 62.70 requires grantees to comply with applicable Office of Management and Budget requirements and VA's standards for financial management for grants and agreements with institutions of higher education, hospitals, and other non-profit organizations (38 CFR 49.21). This provision is included in the proposed rule to ensure grantees are aware of additional requirements with which they must comply.

Proposed § 62.70(e) requires that costs for administration by a grantee do not exceed 10 percent of the total amount of a supportive services grant, which, as explained above in the discussion regarding proposed § 62.10, VA has determined to be reasonable and consistent with the purpose of the SSVF Program. This requirement would ensure that the vast majority of supportive services grant funds (90 percent) are used to provide supportive services to participants, which is the purpose of the SSVF Program.

62.71 Grantee Reporting Requirements

The Act (38 U.S.C. 2044(a)(7)) permits VA to require grantees to submit a report that describes projects carried out using supportive services grant funds. To obtain the information VA deems necessary to analyze and monitor a grantee's performance, proposed § 62.71 contains reporting requirements for grantees to provide information (in such form as may be prescribed by VA) as VA determines necessary to carry out the SSVF Program. Under the proposed rule, grantees must report, on a quarterly basis, any instances when actual supportive services grant expenditures vary from the amount disbursed to a grantee for that same quarter or actual supportive services grant activities vary from the grantee's program description provided in the supportive services grant agreement; this information may lead VA to require a corrective action plan, as described under proposed § 62.60(b).

Proposed § 62.71(f) requires grantees to provide VA with consent to post information from reports on the Internet and use such information in other ways deemed appropriate by VA. Under the proposed rule, grantees are required to clearly mark information that is confidential to individual participants. VA may post portions of the reports on the Internet so that the public has a greater understanding of the SSVF Program. In addition, VA may use the information for promotional or evaluation purposes.

62.72 Recordkeeping

Proposed § 62.72 requires grantees to keep records, and maintain such records for at least a 3 year period, to document compliance with the SSVF Program requirements. Under the proposed rule, grantees would need to produce these records at VA's request. This would assist VA in providing oversight over grantees. In addition, this proposed rule would help VA comply with the Act, which requires VA to study the effectiveness of the program. Public Law 110–387, section 604(c).

62.73 Technical Assistance

Under the Act (38 U.S.C. 2044(d)), proposed § 62.73 explains that VA would provide technical assistance, as necessary, to eligible entities to meet the requirements of the proposed rule. The technical assistance may consist of activities related to the planning, development, and provision of supportive services to very low-income veteran families occupying permanent housing.

In addition to other forms of technical assistance that would be provided, VA will develop a program guide to be used by applicants, grantees, VA staff members, and other interested third parties to assist with understanding and implementing the SSVF Program.

62.80 Withholding, Suspension, Deobligation, Termination, and Recovery of Funds By VA

In accordance with proposed § 62.80, VA may recover from grantees any funds that are not used in accordance with the SSVF Program requirements. In addition, the proposed rule provides that if a grantee fails to comply with these requirements, upon 7 days notice to the grantee, VA may withhold further payment, suspend the supportive services grant, or prohibit the grantee from incurring additional obligations of supportive services grant funds. Proposed § 62.80(c)(1)–(3) provides that VA may terminate a supportive services grant in whole or in part only if the grantee: (1) Materially fails to comply with the terms and conditions of a supportive services grant award or the proposed rule; (2) consents to a termination; or (3) sends written notification setting forth the reasons for termination, the effective date, and in the case of partial termination, the portion to be terminated. In the event VA determines a grantee's requested partial termination would not accomplish the purposes of the supportive services grant, the proposed rule would permit VA to terminate the supportive services grant under proposed § 62.80(c)(1) or § 62.80(c)(2).

The proposed rule provides that VA may deobligate all or a portion of the amounts approved for use by a grantee if, in accordance with proposed § 62.80(d), (1) the activity for which funding was approved is not provided in accordance with the approved application and the SSVF Program requirements, (2) such amounts have not been expended within 1 year from the date the supportive services grant agreement was signed, or (3) other circumstances set forth in the supportive services grant agreement authorize or require such deobligation. Under the proposed rule, VA may advertise in a Notice of Fund Availability the availability of funds that have been deobligated or may award deobligated funds to applicants who have previously submitted applications in response to the most recently published Notice of Fund Availability.

The requirements in proposed § 62.80 would help VA ensure that grant funds are used appropriately. Similar requirements are used in VA's Homeless Providers Grant and Per Diem Program (38 CFR 61.67) and VA's regulations regarding uniform requirements for grants and agreements with institutions of higher education, hospitals, and other non-profit organizations (38 CFR 49.61 and 38 CFR 49.62), and VA has found that they are adequate to safeguard, and maximize optimal use of, grant funds.

62.81 Supportive Services Grant Closeout Procedures

Proposed § 62.81 contains closeout procedures for a supportive services grant which are similar to the procedures established in VA's regulations regarding uniform requirements for grants and agreements with institutions of higher education, hospitals, and other non-profit organizations (38 CFR 49.71). No later than 90 days after the date of completion of a supportive services grant, the proposed rule provides that the grantee must refund to VA any unobligated balance of supportive services grant funds the grantee is not authorized to retain and submit all financial, performance and other reports as required by VA to closeout the supportive services grant. VA would retain the right to recover appropriate

amounts from grantees if final audits are completed after the date of completion.

Paperwork Reduction Act

This proposed rule includes provisions constituting collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521) that require approval by the Office of Management and Budget (OMB). Accordingly, under section 3507(d) of the Act, VA has submitted a copy of this rulemaking to OMB for review. OMB assigns control numbers to collections of information it approves. Except for emergency approvals under 44 U.S.C. 3507(j), VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The proposed rule at proposed §§ 62.20, 62.36(c), 62.60, and 62.71 contains collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521). Accordingly, under section 3507(d) of the Act, VA has submitted a copy of this rulemaking action to OMB for its review of the collections of information. VA has requested OMB to approve the collection of information on an emergency basis by June 4, 2010. This date is consistent with the shortened comment period for comments on the proposed rule and will help avoid a delay in implementation of the SSVF Program. The increased services and funding provided by the SSVF Program are critical to both achieve VA's goal of eliminating veteran homelessness and meet the Congressional mandates for this program. In addition, because the SSVF program would also support VA's homelessness prevention efforts, a delay in funding disbursement may even lead to an increase in homelessness among very low-income veteran families. Therefore, the need to take action is particularly great for those veterans and their families who would benefit from the increased supportive services funded by the SSVF Program. If OMB does not approve the collections of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies sent by mail or hand delivery to: The Director, Office of Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave, NW., Room 1068, Washington, DC 20420; fax to (202) 273–9026; or through *http://www.Regulations.gov.* Comments should indicate that they are submitted in response to "RIN 2900–AN53."

Because VA has requested OMB to approve the collections of information on an emergency basis, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

VA considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of VA, including whether the information will have practical utility;
- Evaluating the accuracy of VA's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

The proposed amendments to title 38, CFR chapter I contain collections of information under the Paperwork Reduction Act for which we are requesting approval by OMB. These collections of information are described immediately following this paragraph, under their respective titles.

Title: Supportive Services for Veteran Families Program.

Summary of collection of information: The proposed rule at proposed § 62.20 contains application provisions for supportive services grants. The proposed rule at proposed § 62.36(c) contains a reference to participant satisfaction surveys. The proposed rule at proposed § 62.60 contains provisions for program or budget changes and submission of corrective action plans. The proposed rule at proposed § 62.71 contains requirements for compliance reports.

Application Provisions for SSVF Program

Description of the need for information and proposed use of information: This information is needed to award supportive services grants to eligible entities.

Description of likely respondents: Non-profit private organizations and consumer cooperatives requesting a supportive service grant.

Estimated number of respondents per year: 100.

Estimated frequency of responses per year: 1.

Estimated total annual reporting and recordkeeping burden: 3,500 hours.

Estimated annual burden per collection: 35 hours.

Supportive Services Grant Renewal Applications for SSVF Program

Description of the need for information and proposed use of information: This information is needed to renew supportive services grants previously awarded.

Description of likely respondents: Entities who have received supportive services grants.

Estimated number of respondents per year: 30.

Estimated frequency of responses per year: 1.

Estimated total annual reporting and recordkeeping burden: 300 hours.

Estimated annual burden per collection: 10 hours.

Participant Satisfaction Surveys

Description of the need for information and proposed use of information: This information is needed for VA to evaluate grantees' performance and participants' satisfaction with the supportive services they receive.

Description of likely respondents: Very low-income veteran families occupying permanent housing that are receiving supportive services from a grantee.

Estimated number of respondents per year: 11,250.

Estimated frequency of responses per year: 2.

Estimated total annual reporting and recordkeeping burden: 5,625 hours.

Estimated annual burden per collection: 15 minutes.

Program or Budget Changes and Corrective Action Plans

Description of the need for information and proposed use of information: This information is needed in order for a grantee to inform VA of significant changes that will alter a supportive services grant program approved by VA. In addition, VA may require grantees to initiate, develop and submit to VA for approval corrective action plans if, on a quarterly basis, actual supportive services grant expenditures vary from the amount disbursed to a grantee for that same quarter or actual supportive services grant activities vary from the grantee's program description provided in the supportive services grant agreement.

Description of likely respondents: entities receiving supportive services grants who desire to change their approved supportive services grant program.

Estimated number of respondents per year: 10.

Estimated frequency of responses per year: 1.

Estimated total annual reporting and recordkeeping burden: 20 hours.

Estimated annual burden per collection: 2 hours.

Compliance reports for SSVF Program

Description of the need for information and proposed use of information: This information is needed to determine compliance with the requirements for a supportive services grant.

Description of likely respondents: entities receiving supportive services grants.

Estimated number of respondents per year: 30.

Estimated frequency of responses per year: 4.

Estimated total annual reporting and recordkeeping burden: 270 hours.

Estimated annual burden per collection: 2.25 hours.

Comment Period

Although under the rulemaking guidelines in Executive Order 12866, VA ordinarily provides a 60-day comment period, the Secretary has determined that there is good cause to limit the public comment period on this proposed rule to 30 days. This proposed rule is necessary to implement section 604 of Public Law 110–387, the Veterans' Mental Health and Other Care Improvements Act of 2008, which authorizes VA to award grants to eligible entities to provide and coordinate the supportive services described in 38 U.S.C. 2044(b) for very low-income veteran families occupying permanent housing. These increased services and funding are critical to both achieve VA's goal of eliminating veteran homelessness and meet the Congressional mandates for this program. In addition, because the SSVF program would also support VA's homelessness prevention efforts, a delay in funding disbursement may even lead to an increase in homelessness among very low-income veteran families. Therefore, the need to take action is particularly great for those veterans and their families who would benefit from the increased supportive services funded by the SSVF Program. Accordingly, the Secretary has provided a 30-day comment period for this proposed rule.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by OMB unless OMB waives such a review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action planned or taken by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, economic, legal, and policy implications of this proposed rule have been examined and it has been determined to be a significant regulatory action under Executive Order 12866 because it may result in a rule that raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* This proposed rule would only impact those entities that choose to participate in the SSVF Program. Small entity applicants will not be affected to a greater extent than large entity applicants. Small entities must elect to participate, and it is considered a benefit to those who choose to apply. To the extent this proposed rule would have any impact on small entities, it would not have an impact on a substantial number of small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirement of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, or tribal governments, in the aggregate, or by the private sector of $100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, or tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Program

There is no Catalog of Federal Domestic Assistance program number and title for the program in this proposal.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on January 26, 2010, for publication.

List of Subjects in 38 CFR Part 62

Administrative practice and procedure, Day care, Disability benefits, Government contracts, Grant programs-health, Grant programs-social services, Grant programs-transportation, Grant programs-veterans, Grants-housing and community development, Health care, Homeless, Housing, Housing assistance payments, Indians-lands, Individuals with disabilities, Low and moderate income housing, Manpower training program, Medicare, Medicaid, Public assistance programs, Public housing, Relocation assistance, Rent subsidies, Reporting and recordkeeping requirements, Rural areas, Social security, Supplemental security income (SSI), Travel and transportation expenses, Unemployment compensation, Veterans.

Dated: April 29, 2010.

Robert C. McFetridge,

Director, Regulation Policy and Management, Office of the General Counsel.

For the reasons stated in the preamble, VA proposes to amend 38 CFR chapter I to add a new part 62 to read as follows:

PART 62—SUPPORTIVE SERVICES FOR VETERAN FAMILIES PROGRAM

Sec.

Authority: 38 U.S.C. 501, 2044, and as noted in specific sections

§ 62.1 Purpose.

This part implements the Supportive Services for Veteran Families Program, which provides supportive services grants to eligible entities to facilitate the provision of supportive services to very low-income veteran families who are occupying permanent housing.

(Authority: 38 U.S.C. 501, 2044)

§ 62.2 Definitions.

For purposes of this part and any Notice of Fund Availability issued under this part:

Applicant means an eligible entity that submits an application for a supportive services grant announced in a Notice of Fund Availability.

Area or community means a political subdivision or contiguous political subdivisions (such as a precinct, ward, borough, city, county, State, Congressional district or tribal reservation) with an identifiable population of very low-income veteran families.

Consumer cooperative has the meaning given such term in section 202 of the Housing Act of 1959 (12 U.S.C. 1701q).

Date of completion means the earliest of the following dates:

(1) The date on which all required work is completed;

(2) The date specified in the supportive services grant agreement, or any supplement or amendment thereto; or

(3) The effective date of a supportive services grant termination under § 62.80(c).

Disallowed costs means costs charged by a grantee that VA determines to be unallowable based on applicable Federal cost principles, or based on this part or the supportive services grant agreement.

Eligible entity means a:

(1) Private non-profit organization, or

(2) Consumer cooperative.

Emergency supplies means items necessary for a participant's life or safety that are provided to the participant by a grantee on a temporary basis in order to address the participant's emergency situation.

Grantee means an eligible entity that is awarded a supportive services grant under this part.

Homeless has the meaning given that term in section 103 of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11302).

Notice of Fund Availability means a Notice of Fund Availability published in the **Federal Register** in accordance with § 62.40.

Occupying permanent housing means meeting any of the conditions set forth in § 62.11(a).

Participant means a very low-income veteran family occupying permanent housing who is receiving supportive services from a grantee.

Permanent housing means community-based housing without a designated length of stay. Examples of permanent housing include, but are not limited to, a house or apartment with a month-to-month or annual lease term or home ownership.

Private non-profit organization means any of the following:

(1) An incorporated private institution or foundation that:

(i) Has no part of the net earnings that inure to the benefit of any member, founder, contributor, or individual;

(ii) Has a governing board that is responsible for the operation of the supportive services provided under this part; and

(iii) Is approved by VA as to financial responsibility.

(2) A for-profit limited partnership, the sole general partner of which is an organization meeting the requirements of paragraphs (1)(i), (ii) and (iii) of this definition.

(3) A corporation wholly owned and controlled by an organization meeting the requirements of paragraphs (1)(i), (ii), and (iii) of this definition.

(4) A tribally designated housing entity (as defined in section 4 of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4103)).

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under the United States Housing Act of 1937.

Subcontractor means any third party contractor, of any tier, working directly for an eligible entity.

Supportive services means any of the following provided to address the needs of a participant:

(1) Outreach services as specified under § 62.30.

(2) Case management services as specified under § 62.31.

(3) Assisting participants in obtaining VA benefits as specified under § 62.32.

(4) Assisting participants in obtaining and coordinating other public benefits as specified under § 62.33.

(5) Other services as specified under § 62.34.

Supportive services grant means a grant awarded under this part.

Supportive services grant agreement means the agreement executed between VA and a grantee as specified under § 62.50.

Suspension means an action by VA that temporarily withdraws VA funding under a supportive services grant, pending corrective action by the grantee or pending a decision to terminate the supportive services grant by VA. Suspension of a supportive services grant is a separate action from suspension under VA regulations implementing Executive Orders 12549 and 12689, "Debarment and Suspension."

Third party in-kind contributions means the value of non-cash contributions provided by non-Federal third parties. Third party in-kind

contributions may be in the form of real property, equipment, supplies, and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the grantee's program.

VA means the Department of Veterans Affairs.

Very low-income veteran family means a veteran family whose annual income, as determined in accordance with 24 CFR 5.609, does not exceed 50 percent of the median income for an area or community, as will be adjusted by VA based on family size and as may be adjusted and announced by VA in the Notice of Fund Availability based on residency within an area with unusually high or low construction costs, fair market rents (as determined under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f)), or family incomes. Unless VA announces otherwise in the Notice of Fund Availability, the median income for an area or community will be determined using the income limits most recently published by the Department of Housing and Urban Development for programs under section 8 of the United States Housing Act of 1937 (42 U.S.C. 1437f).

Veteran means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.

Veteran family means a veteran who is a single person or a family in which the head of household, or the spouse of the head of household, is a veteran.

Withholding means that payment of a supportive services grant will not be paid until such time as VA determines that the grantee provides sufficiently adequate documentation and/or actions to correct a deficiency for the supportive services grant. Costs for supportive services provided by grantees under the supportive services grant from the date of the withholding letter would be reimbursed only if the grantee is able to submit the documentation or actions that the deficiency has been corrected to the satisfaction of VA.

(Authority: 38 U.S.C. 501, 2044)

§ 62.10 Supportive services grants—general.

(a) VA provides supportive services grants to eligible entities as described in this part.

(b) Grantees must use at least 90 percent of supportive services grant funds to provide and coordinate the provision of supportive services to very low-income veteran families who are occupying permanent housing.

(c) Grantees may use up to 10 percent of supportive services grant funds for administrative costs identified in § 62.70.

(Authority: 38 U.S.C. 501, 2044)

§ 62.11 Participants—occupying permanent housing.

(a) *Occupying permanent housing.* A very low-income veteran family will be considered to be occupying permanent housing if the very low-income veteran family:

(1) Is residing in permanent housing;

(2) Is homeless and scheduled to become a resident of permanent housing within 90 days pending the location or development of housing suitable for permanent housing; or

(3) Has exited permanent housing within the previous 90 days to seek other housing that is responsive to the very low-income veteran family's needs and preferences.

Cross Reference: For limitations on and continuations of the provision of supportive services to participants classified under paragraphs (a)(2) and (a)(3) of this section, see § 62.35.

(b) *Changes to a participant's classification for occupying permanent housing.* If a participant's classification for occupying permanent housing changes while the participant is receiving supportive services from a grantee, the participant may be reclassified under the categories set forth in paragraph (a) of this section.

(Authority: 38 U.S.C. 501, 2044)

§ 62.20 Applications for supportive services grants.

(a) To apply for a supportive services grant, an applicant must submit to VA a complete supportive services grant application package, as described in the Notice of Fund Availability. A complete supportive services grant application package includes the following:

(1) A description of the supportive services to be provided by the applicant and the identified need for such supportive services among very low-income veteran families;

(2) A description of the characteristics of very low-income veteran families occupying permanent housing who will be provided supportive services by the applicant;

(3) An estimate with supporting documentation of the number of very low-income veteran families occupying permanent housing who will be provided supportive services by the applicant and a description of the area or community where such very low-income veteran families are located;

(4) Documentation evidencing the experience of the applicant and any identified subcontractors in providing supportive services to very low-income veteran families and very low-income families;

(5) Documentation relating to the applicant's ability to coordinate with any identified subcontractors;

(6) Documentation of the managerial capacity of the applicant to:

(i) Coordinate the provision of supportive services with the provision of permanent housing by the applicant or by other organizations;

(ii) Assess continuously the needs of participants for supportive services;

(iii) Coordinate the provision of supportive services with services provided by VA;

(iv) Customize supportive services to the needs of participants;

(v) Continuously seek new sources of assistance to ensure the long-term provision of supportive services to very low-income veteran families occupying permanent housing;

(vi) Comply with and implement the requirements of this part throughout the term of the supportive services grant; and

(7) Any additional information as deemed appropriate by VA.

(b) Grantees may submit an application for renewal of a supportive services grant if the grantee's program will remain substantially the same. To apply for renewal of a supportive services grant, a grantee must submit to VA a complete supportive services grant renewal application package, as described in the Notice of Fund Availability.

(c) VA may request in writing that an applicant or grantee, as applicable, submit other information or documentation relevant to the supportive services grant application.

(Authority: 38 U.S.C. 501, 2044)

§ 62.21 Threshold requirements prior to scoring supportive services grant applicants.

VA will only score applicants that meet the following threshold requirements:

(a) The application is filed within the time period established in the Notice of Fund Availability, and any additional information or documentation requested by VA under § 62.20(c) is provided within the time frame established by VA;

(b) The application is completed in all parts;

(c) The applicant is an eligible entity;

(d) The activities for which the supportive services grant is requested are eligible for funding under this part;

(e) The applicant's proposed participants are eligible to receive supportive services under this part;

(f) The applicant agrees to comply with the requirements of this part;

(g) The applicant does not have an outstanding obligation to the Federal government that is in arrears and does not have an overdue or unsatisfactory response to an audit;

(h) The applicant is not in default by failing to meet the requirements for any previous Federal assistance; and

(i) The applicant provides evidence that the minimum cost sharing requirement is satisfied.

(Authority: 38 U.S.C. 501, 2044)

§ 62.22 Scoring criteria for supportive services grant applicants.

VA will use the following criteria to score applicants who are applying for a supportive services grant:

(a) VA will award up to 35 points based on the background, qualifications, experience, and past performance, of the applicant, and any subcontractors identified by the applicant in the supportive services grant application, as demonstrated by the following:

(1) *Background and organizational history.*

(i) Applicant's, and any identified subcontractors', background and organizational history are relevant to the program.

(ii) Applicant, and any identified subcontractors, maintain organizational structures with clear lines of reporting and defined responsibilities.

(iii) Applicant, and any identified subcontractors, have a history of complying with agreements and not defaulting on financial obligations.

(2) *Staff qualifications.*

(i) Applicant's staff, and any identified subcontractors' staff, have experience working with very low-income families.

(ii) Applicant's staff, and any identified subcontractors' staff, have experience administering programs similar to the Supportive Services for Veteran Families Program.

(3) *Organizational qualifications and past performance.*

(i) Applicant, and any identified subcontractors, have organizational experience providing supportive services to very low-income families.

(ii) Applicant, and any identified subcontractors, have organizational experience coordinating services for very low-income families among multiple organizations, Federal, State, local and tribal governmental entities.

(iii) Applicant, and any identified subcontractors, have organizational experience administering a program similar in type and scale to the Supportive Services for Veteran Families Program to very low-income families.

(4) *Experience working with veterans.*

(i) Applicant's staff, and any identified subcontractors' staff, have experience working with veterans.

(ii) Applicant, and any identified subcontractors, have organizational experience providing supportive services to veterans.

(iii) Applicant, and any identified subcontractors, have organizational experience coordinating services for veterans among multiple organizations, Federal, State, local and tribal governmental entities.

(b) VA will award up to 25 points based on the applicant's program concept and supportive services plan, as demonstrated by the following:

(1) *Need for program.*

(i) Applicant has shown a need amongst very low-income veteran families occupying permanent housing in the area or community where the program will be based.

(ii) Applicant understands the unique needs for supportive services of very low-income veteran families.

(2) *Outreach and screening plan.*

(i) Applicant has a feasible outreach and referral plan to identify and assist very low-income veteran families occupying permanent housing that may be eligible for supportive services.

(ii) Applicant has a plan to process and receive participant referrals.

(iii) Applicant has a plan to assess and accommodate the needs of incoming participants.

(3) *Program concept.*

(i) Applicant's program concept, size, scope, and staffing plan are feasible.

(ii) Applicant's program is designed to meet the needs of very low-income veteran families occupying permanent housing.

(4) *Program implementation timeline.*

(i) Applicant's program will be implemented in a timely manner and supportive services will be delivered to participants as quickly as possible and within a specified timeline.

(ii) Applicant has a hiring plan in place to meet the applicant's program timeline or has existing staff to meet such timeline.

(5) *Collaboration and communication with VA.* Applicant has a plan to coordinate outreach and services with local VA facilities.

(6) *Ability to meet VA's requirements, goals and objectives for the Supportive Services for Veteran Families Program.* Applicant is committed to ensuring that its program meets VA's requirements, goals and objectives for the Supportive Services for Veteran Families Program as identified in this part and the Notice of Fund Availability.

(7) *Capacity to undertake program.* Applicant has sufficient capacity, including staff resources, to undertake the program.

(c) VA will award up to 15 points based on the applicant's quality assurance and evaluation plan, as demonstrated by the following:

(1) *Program evaluation.*

(i) Applicant has created clear, realistic, and measurable goals against which the applicant's program performance can be evaluated.

(ii) Applicant plans to continually assess the program.

(2) *Monitoring.*

(i) Applicant has adequate controls in place to regularly monitor the program, including any subcontractors, for compliance with all applicable laws, regulations, and guidelines.

(ii) Applicant has adequate financial and operational controls in place to ensure the proper use of supportive services grant funds.

(iii) Applicant has a plan for ensuring that the applicant's staff and any subcontractors are appropriately trained and stays informed of industry trends and the requirements of this part.

(3) *Remediation.* Applicant has a plan to establish a system to remediate non-compliant aspects of the program if and when they are identified.

(4) *Management and reporting.* Applicant's program management team has the capability and a system in place to provide to VA timely and accurate reports at the frequency set by VA.

(d) VA will award up to 15 points based on the applicant's financial capability and plan, as demonstrated by the following:

(1) *Organizational finances.* Applicant, and any identified subcontractors, are financially stable.

(2) *Financial feasibility of program.*

(i) Applicant has a realistic plan for obtaining all funding required to operate the program for the time period of the supportive services grant.

(ii) Applicant's program is cost-effective and can be effectively implemented on-budget.

(3) *Cost sharing requirement.* Applicant has exceeded the minimum cost sharing requirement up to a certain percentage as set forth in the Notice of Fund Availability.

(e) VA will award up to 10 points based on the applicant's area or community linkages and relations, as demonstrated by the following:

(1) *Area or community linkages.* Applicant has a plan for developing or has existing linkages with Federal (including VA), State, local, and tribal government agencies, and private entities for the purposes of providing additional services to participants.

(2) *Past working relationships.* Applicant (or applicant's staff), and any

identified subcontractors (or subcontractors' staff), have fostered successful working relationships and linkages with public and private organizations providing services to veterans or very low-income families in need of services similar to the supportive services.

(3) *Local presence and knowledge.*

(i) Applicant has a presence in the area or community to be served by the applicant.

(ii) Applicant understands the dynamics of the area or community to be served by the applicant.

(4) *Integration of linkages and program concept.* Applicant's linkages to the area or community to be served by the applicant enhance the effectiveness of the applicant's program.

(Authority: 38 U.S.C. 501, 2044)

§ 62.23 Selecting applicants to receive supportive services grants.

VA will use the following process to select applicants to receive supportive services grants:

(a) VA will score all applicants that meet the threshold requirements set forth in § 62.21 using the scoring criteria set forth in § 62.22.

(b) VA will group applicants within the applicable funding priorities if funding priorities are set forth in the Notice of Fund Availability.

(c) VA will rank those applicants who receive at least the minimum amount of total points and points per category set forth in the Notice of Fund Availability, within their respective funding priority group, if any. The applicants will be ranked in order from highest to lowest scores, within their respective funding priority group, if any.

(d) VA will use the applicant's ranking as the primary basis for selection for funding. However, VA will also use the following considerations to select applicants for funding:

(1) VA will give preference to applicants that provide or coordinate the provision of supportive services for very low-income veteran families transitioning from homelessness to permanent housing; and

(2) To the extent practicable, VA will ensure that supportive services grants are equitably distributed across geographic regions, including rural communities and tribal lands.

(e) Subject to paragraph (d) of this section, VA will fund the highest-ranked applicants for which funding is available, within the highest funding priority group, if any. If funding priorities have been established, to the extent funding is available and subject to paragraph (d) of this section, VA will select applicants in the next highest funding priority group based on their rank within that group.

(Authority: 38 U.S.C. 501, 2044)

§ 62.24 Scoring criteria for grantees applying for renewal of supportive services grants.

VA will use the following criteria to score grantees applying for renewal of a supportive services grant:

(a) VA will award up to 55 points based on the success of the grantee's program, as demonstrated by the following:

(i) Participants made progress in achieving housing stability.

(ii) Participants were satisfied with the supportive services provided by the grantee.

(iii) The grantee implemented the program and delivered supportive services to participants in a timely manner.

(b) VA will award up to 30 points based on the cost-effectiveness of the grantee's program, as demonstrated by the following:

(i) The cost per participant household was reasonable.

(ii) The grantee's program was effectively implemented on-budget.

(c) VA will award up to 15 points based on the extent to which the grantee's program complies with Supportive Services for Veteran Families Program goals and requirements, as demonstrated by the following:

(i) The grantee's program was administered in accordance with VA's goals for the Supportive Services for Veteran Families Program.

(ii) The grantee's program was administered in accordance with all applicable laws, regulations, and guidelines.

(iii) The grantee's program was administered in accordance with the grantee's supportive services grant agreement.

(Authority: 38 U.S.C. 501, 2044)

§ 62.25 Selecting grantees for renewal of supportive services grants.

VA will use the following process to select grantees applying for renewal of supportive services grants:

(a) So long as the grantee continues to meet the threshold requirements set forth in § 62.21, VA will score the grantee using the scoring criteria set forth in § 62.24.

(b) VA will rank those grantees who receive at least the minimum amount of total points and points per category set forth in the Notice of Fund Availability. The grantees will be ranked in order from highest to lowest scores.

(c) VA will use the grantee's ranking as the basis for selection for funding. VA will fund the highest-ranked grantees for which funding is available.

(Authority: 38 U.S.C. 501, 2044)

§ 62.26 Cost sharing requirement.

(a) The grantee must match the amount of VA-provided supportive services grant funds with a minimum of 10 percent of funds from non-VA sources. The matching funds can be in the form of either or both of the following:

(1) Cash resources provided by one or more of the following: the grantee; the Federal government (but excluding any funds provided by VA); State, local and tribal governments; or private resources.

(2) Third party in-kind contributions.

(b) Contributions will be accepted as part of the grantee's cost sharing when such contributions meet the conditions of § 49.23 of this chapter.

(c) The grantee must ensure that any funds used to satisfy the cost sharing requirement of this section are eligible to be used under the rules governing such funds. (Use of Federal funds as a match requires that the agency whose funds would be so used has specific statutory authority allowing its funding to be used for cost sharing or matching.)

(Authority: 38 U.S.C. 501, 2044)

§ 62.30 Supportive service: outreach services.

(a) Grantees must provide outreach services and use their best efforts to ensure that hard-to-reach very low-income veteran families occupying permanent housing are found, engaged, and provided supportive services.

(b) Outreach services must include active liaison with local VA facilities, State, local, tribal (if any), and private agencies and organizations providing supportive services to very low-income veteran families in the area or community to be served by the grantee.

(Authority: 38 U.S.C. 501, 2044)

§ 62.31 Supportive service: case management services.

Grantees must provide case management services that include, at a minimum:

(a) Performing a careful assessment of participant functions and developing and monitoring case plans in coordination with a formal assessment of supportive services needed, including necessary follow-up activities, to ensure that the participant's needs are adequately addressed;

(b) Establishing linkages with appropriate agencies and service providers in the area or community to help participants obtain needed supportive services;

(c) Providing referrals to participants and related activities (such as scheduling appointments for participants) to help participants obtain needed supportive services, such as medical, social, and educational assistance or other supportive services to address participants' identified needs and goals;

(d) Deciding how resources are allocated to participants on the basis of need; and

(e) Educating participants on issues, including, but not limited to, supportive services availability and participant rights.

(Authority: 38 U.S.C. 501, 2044)

§ 62.32 Supportive service: assistance in obtaining VA benefits.

(a) Grantees must assist participants in obtaining any benefits from VA for which the participants are eligible. Such benefits include, but are not limited to:

(1) Vocational and rehabilitation counseling;

(2) Employment and training service;

(3) Educational assistance; and

(4) Health care services.

(b) Grantees are not permitted to represent participants before VA with respect to a claim for VA benefits unless they are recognized for that purpose pursuant to 38 U.S.C. 5902. Employees and members of grantees are not permitted to provide such representation unless the individual providing representation is accredited pursuant to 38 U.S.C. chapter 59.

(Authority: 38 U.S.C. 501, 2044)

§ 62.33 Supportive service: assistance in obtaining and coordinating other public benefits.

Grantees must assist participants to obtain, and coordinate the provision of, other public benefits that are being provided by Federal, State, local, or tribal agencies, or any eligible entity in the area or community served by the grantee. Such public benefits may include, but are not limited to:

(a) Health care services, which include:

(1) Health insurance; and

(2) Referral to a governmental or eligible entity that provides any of the following services:

(i) Hospital care, nursing home care, out-patient care, mental health care, preventive care, habilitative and rehabilitative care, case management, respite care, and home care;

(ii) The training of any very low-income veteran family member in the care of any very low-income veteran family member; and

(iii) The provision of pharmaceuticals, supplies, equipment, devices, appliances, and assistive technology.

(b) Daily living services, which may consist of the referral of a participant, as appropriate, to an entity that provides services relating to the functions or tasks for self-care usually performed in the normal course of a day, including, but not limited to, eating, bathing, grooming, dressing, and home management activities.

(c) Personal financial planning services, which include, at a minimum, providing recommendations regarding day-to-day finances and achieving long-term budgeting and financial goals.

(d) Transportation services.

(1) The grantee may provide temporary transportation services to participants if the grantee determines such assistance is necessary; however, the preferred method of provision of transportation services is the provision of tokens, vouchers, or other appropriate instruments so that participants may use available public transportation options.

(2) If public transportation options are not sufficient within an area or community, costs related to the lease of vehicle(s) may be included in a supportive services grant application if the applicant or grantee, as applicable, agrees that:

(i) The vehicle(s) will be safe, accessible, and equipped to meet the needs of the participants;

(ii) The vehicle(s) will be maintained in accordance with the manufacturer's recommendations; and

(iii) All transportation personnel (employees and subcontractors) will be trained in managing any special needs of participants and handling emergency situations.

(e) Income support services, which may consist of providing assistance in obtaining other Federal, State, tribal and local assistance, in the form of, but not limited to, mental health benefits, employment counseling, medical assistance, veterans' benefits, and income support assistance.

(f) Fiduciary and representative payee services, which may consist of acting on behalf of a participant by receiving the participant's paychecks, benefits or other income, and using those funds for the current and foreseeable needs of the participant and saving any remaining funds for the participant's future use in an interest bearing account or saving bonds.

(g) Legal services to assist a participant with issues that interfere with the participant's ability to obtain or retain permanent housing or supportive services.

(h) Child care, which includes the:

(1) Referral of a participant, as appropriate, to a State-licensed facility that provides child care with sufficient hours of operation and serves appropriate ages, as needed by the participant; and

(2) Payment by a grantee on behalf of a participant for child care at a State-licensed facility.

(i) Payments for child care services must be paid by the grantee directly to a State-licensed facility and cannot exceed a maximum of 2 months in a calendar year.

(ii) Grantees may require participants to share in the cost of child care as a condition of receiving payments for child care services.

(iii) Payments for child care services cannot be provided on behalf of participants for the same period of time and for the same cost types that are being provided through another Federal, State or local subsidy program.

(iv) As a condition of providing payments for child care services, the grantee must help the participant develop a reasonable plan to address the participant's future ability to pay for child care services and assist the participant to implement such plan.

(i) Housing counseling, which includes the provision of counseling relating to the stabilization of a participant's residence in permanent housing. At a minimum, housing counseling includes providing referrals to appropriate local, tribal, State, and Federal resources, and providing counseling, education and outreach directly to participants on the following topics, as appropriate:

(1) Housing search assistance, including the location of vacant units, the scheduling of appointments, viewing apartments, reviewing tenant leases, and negotiating with landlords on behalf of a participant;

(2) Rental and rent subsidy programs;

(3) Federal, State, tribal, or local assistance;

(4) Fair housing;

(5) Landlord tenant laws;

(6) Lease terms;

(7) Rent delinquency;

(8) Resolution or prevention of mortgage delinquency, including, but not limited to, default and foreclosure, loss mitigation, budgeting, and credit; and

(9) Home maintenance and financial management.

(Authority: 38 U.S.C. 501, 2044)

§ 62.34 Other supportive services.

Grantees may provide the following services which are necessary for maintaining independent living in permanent housing and housing stability:

(a) *Rental assistance.* Payment of rent, penalties or fees to help the participant

remain in permanent housing or obtain permanent housing.

(1) A participant may receive rental assistance for a maximum of 4 months during a 3-year period, such period beginning on the date that the grantee first pays rent on behalf of the participant; however, a participant cannot receive rental assistance for more than 2 months in any calendar year. The rental assistance may be for rental payments that are currently due or are in arrears, and for the payment of penalties or fees incurred by a participant and required to be paid by the participant under an existing lease or court order. In all instances, rental assistance may only be provided if the payment of such rental assistance will directly allow the participant to remain in permanent housing or obtain permanent housing.

(2) Rental assistance must be paid by the grantee directly to the third party to whom rent is owed.

(3) As a condition of providing rental assistance, the grantee must help the participant develop a reasonable plan to address the participant's future ability to pay rent and assist the participant to implement such plan.

(4) The rental assistance paid by a grantee must be in compliance with the following "rent reasonableness" standard. "Rent reasonableness" means the total rent charged for a unit must be reasonable in relation to the rents being charged during the same time period for comparable units in the private unassisted market and must not be in excess of rents being charged by the property owner during the same time period for comparable non-luxury unassisted units. To make this determination, the grantee should consider: (i) The location, quality, size, type, and age of the unit; and (ii) any amenities, housing services, maintenance, and utilities to be provided by the property owner. Comparable rents can be checked by using a market study, by reviewing comparable units advertised for rent, or using a note from the property owner verifying the comparability of charged rents to other units owned by the property owner. Prior to providing rental assistance in the form of payment of penalties or fees incurred by a participant, the grantee must determine that such penalties or fees are reasonable.

(5) With respect to shared housing arrangements, the rent charged for a participant must be in relation to the size of the private space for that participant in comparison to other private space in the shared unit, excluding common space. A participant may be assigned a pro rata portion based on the ratio derived by dividing the number of bedrooms in their private space by the number of bedrooms in the unit. Participation in shared housing arrangements must be voluntary.

(6) Rental assistance payments cannot be provided on behalf of participants for the same period of time and for the same cost types that are being provided through another Federal, State, or local housing subsidy program.

(7) Grantees may require participants to share in the cost of rent as a condition of receiving rental assistance.

(b) *Utility-fee payment assistance.* Payment of utility fees to help the participant to remain in permanent housing or obtain permanent housing.

(1) A participant may receive payments for utilities for a maximum of 4 months during a 3-year period, such period beginning on the date that the grantee first pays utility fees on behalf of the participant; provided, however, that a participant cannot receive payments for utilities for more than 2 months in any calendar year. The payment for utilities may be for utility payments that are currently due or are in arrears, provided that the payment of such utilities will allow the participant to remain in permanent housing or obtain permanent housing.

(2) Payments for utilities must be paid by the grantee directly to a utility company. Payments for utilities only will be available if a participant, a legal representative of the participant, or a member of his/her household, has an account in his/her name with a utility company or proof of responsibility to make utility payments, such as cancelled checks or receipts in his/her name from a utility company.

(3) As a condition of providing payments for utilities, the grantee must help the participant develop a reasonable plan to address the participant's future ability to pay utility payments and assist the participant to implement such plan.

(4) Payments for utilities cannot be provided on behalf of participants for the same period of time and for the same cost types that are being provided through another Federal, State, or local program.

(5) Grantees may require participants to share in the cost of utility payments as a condition of receiving payments for utilities.

(c) *Deposits.* Payment of security deposits or utility deposits to help the participant remain in permanent housing or obtain permanent housing.

(1) A participant may receive assistance with the payment of a security deposit a maximum of one time in every 3-year period, such period beginning on the date the grantee pays a security deposit on behalf of a participant.

(2) A participant may receive assistance with the payment of a utility deposit a maximum of one time in every 3-year period, such period beginning on the date the grantee pays a utility deposit on behalf of a participant.

(3) Any security deposit or utility deposit must be paid by the grantee directly to the third party to whom the security deposit or utility deposit is owed. The payment of such deposit must allow the participant to remain in the participant's existing permanent housing or help the participant to obtain and remain in permanent housing selected by the participant.

(4) As a condition of providing a security deposit payment or a utility deposit payment, the grantee must help the participant develop a reasonable plan to address the participant's future housing stability and assist the participant to implement such plan.

(5) Security deposits and utility deposits covering the same period of time in which assistance is being provided through another housing subsidy program are eligible, as long as they cover separate cost types.

(6) Grantees may require participants to share in the cost of the security deposit or utility deposit as a condition of receiving assistance with such deposit.

(d) *Moving costs.* Payment of moving costs to help the participant to obtain permanent housing.

(1) A participant may receive assistance with moving costs a maximum of one time in every 3-year period, such period beginning on the date the grantee pays moving costs on behalf of a participant.

(2) Moving costs assistance must be paid by the grantee directly to a third party. Moving costs assistance includes reasonable moving costs, such as truck rental, hiring a moving company, or short-term storage fees for a maximum of 3 months or until the participant is in permanent housing, whichever is shorter.

(3) As a condition of providing moving costs assistance, the grantee must help the participant develop a reasonable plan to address the participant's future housing stability and assist the participant to implement such plan.

(4) Moving costs assistance payments cannot be provided on behalf of participants for the same period of time and for the same cost types that are being provided through another Federal, State, or local program.

(5) Grantees may require participants to share in the cost of moving as a condition of receiving assistance with moving costs.

(e) *Purchase of emergency supplies for a participant.*

(1) A grantee may purchase emergency supplies for a participant on a temporary basis.

(2) The costs of the emergency supplies must be paid by the grantee directly to a third party.

(f) *Other.* Other services as set forth in the Notice of Fund Availability or as approved by VA that are consistent with the Supportive Services for Veteran Families Program. Applicants may propose additional services in their supportive services grant application, and grantees may propose additional services by submitting a written request to modify the supportive services grant in accordance with § 62.60.

(Authority: 38 U.S.C. 501, 2044)

§ 62.35 Limitations on and continuations of the provision of supportive services to certain participants.

(a) *Continuation of the provision of supportive services to a participant classified under § 62.11(a)(2).* If a participant classified under § 62.11(a)(2) does not become a resident of permanent housing within the originally scheduled 90-day period, the grantee may continue to provide supportive services to a participant classified under § 62.11(a)(2) for such time that the participant continues to meet the requirements of § 62.11(a)(2).

(b) *Limitations on the provision of supportive services to participants classified under § 62.11(a)(3).*

(1) A grantee may provide supportive services to a participant classified under § 62.11(a)(3) until the earlier of the following dates:

(i) The participant commences receipt of other housing services adequate to meet the participant's needs; or

(ii) Ninety days from the date the participant exits permanent housing.

(2) Supportive services provided to participants classified under § 62.11(a)(3) must be designed to support the participants in their choice to transition into housing that is responsive to their individual needs and preferences.

(c) *Continuation of supportive services to veteran family member(s).* If a veteran becomes absent from a household or dies while other members of the veteran family are receiving supportive services, then such supportive services must continue for a grace period following the absence or death of the veteran. The grantee must establish a reasonable grace period for continued participation by the veteran's family member(s), but that period may not exceed 1 year from the date of absence or death of the veteran, subject to the requirements of paragraphs (a) and (b) of this section. The grantee must notify the veteran's family member(s) of the duration of the grace period.

(d) *Referral for other assistance.* If a participant becomes ineligible to receive supportive services under this section, the grantee must provide the participant with information on other available programs or resources.

(Authority: 38 U.S.C. 501, 2044)

§ 62.36 General operation requirements.

(a) *Eligibility documentation.* Grantees must verify and document each participant's eligibility for supportive services and classify the participant under one of the categories set forth in § 62.11(a). Grantees must certify the eligibility and classification of each participant at least once every 3 months.

(b) *Confidentiality.* Grantees must maintain the confidentiality of records kept on participants. Grantees that provide family violence prevention or treatment services must establish and implement procedures to ensure the confidentiality of:

(1) Records pertaining to any individual provided services, and

(2) The address or location where the services are provided.

(c) *Notifications to participants.*

(1) Prior to initially providing supportive services to a participant, the grantee must notify each participant that the supportive services are being paid for, in whole or in part, by VA.

(2) The grantee must provide each participant with a satisfaction survey which can be submitted by the participant directly to VA, within 45 to 60 days of the participant's entry into the grantee's program and again within 30 days of such participant's pending exit from the grantee's program.

(d) *Assessment of funds.* Grantees must regularly assess how supportive services grant funds can be used in conjunction with other available funds and services to assist participants.

(e) *Administration of supportive services grants.* Grantees must ensure that supportive services grants are administered in accordance with the requirements of this part, the supportive services grant agreement, and other applicable laws and regulations. Grantees are responsible for ensuring that any subcontractors carry out activities in compliance with this part.

(Authority: 38 U.S.C. 501, 2044)

§ 62.37 Fee prohibition.

Grantees must not charge a fee to very low-income veteran families for providing supportive services that are funded with amounts from a supportive services grant or cost-sharing funds under § 62.26.

(Authority: 38 U.S.C. 501, 2044)

§ 62.40 Notice of Fund Availability.

When funds are available for supportive services grants, VA will publish a Notice of Fund Availability in the **Federal Register**. The notice will identify:

(a) The location for obtaining supportive services grant applications;

(b) The date, time, and place for submitting completed supportive services grant applications;

(c) The estimated amount and type of supportive services grant funding available;

(d) Any priorities for or exclusions from funding to meet the statutory mandates of 38 U.S.C. 2044 and VA goals for the Supportive Services for Veteran Families Program;

(e) The length of term for the supportive services grant award;

(f) The minimum number of total points and points per category that an applicant or grantee, as applicable, must receive in order for a supportive services grant to be funded;

(g) Any maximum uses of supportive services grant funds for specific supportive services;

(h) The timeframes and manner for payments under the supportive services grant; and

(i) Other information necessary for the supportive services grant application process as determined by VA.

(Authority: 38 U.S.C. 501, 2044)

§ 62.50 Supportive services grant agreements.

(a) After an applicant is selected for a supportive services grant in accordance with § 62.23, VA will draft a supportive services grant agreement to be executed by VA and the applicant. Upon execution of the supportive services grant agreement, VA will obligate supportive services grant funds to cover the amount of the approved supportive services grant, subject to the availability of funding. The supportive services grant agreement will provide that the grantee agrees, and will ensure that each subcontractor agrees, to:

(1) Operate the program in accordance with the provisions of this part and the applicant's supportive services grant application;

(2) Comply with such other terms and conditions, including recordkeeping

and reports for program monitoring and evaluation purposes, as VA may establish for purposes of carrying out the Supportive Services for Veteran Families Program, in an effective and efficient manner; and

(3) Provide such additional information as deemed appropriate by VA.

(b) After a grantee is selected for renewal of a supportive services grant in accordance with § 62.25, VA will draft a supportive services grant agreement to be executed by VA and the grantee. Upon execution of the supportive services grant agreement, VA will obligate supportive services grant funds to cover the amount of the approved supportive services grant, subject to the availability of funding. The supportive services grant agreement will contain the same provisions described in paragraph (a) of this section.

(c) No funds provided under this part may be used to replace Federal, State, tribal, or local funds previously used, or designated for use, to assist very low-income veteran families.

(Authority: 38 U.S.C. 501, 2044)

§ 62.51 Payments under the supportive services grant.

Grantees are to be paid in accordance with the timeframes and manner set forth in the Notice of Fund Availability.

(Authority: 38 U.S.C. 501, 2044)

§ 62.60 Program or budget changes and corrective action plans.

(a) A grantee must submit to VA a written request to modify a supportive services grant for any proposed significant change that will alter the supportive services grant program. If VA approves such change, VA will issue a written amendment to the supportive services grant agreement. A grantee must receive VA's approval prior to implementing a significant change. Significant changes include, but are not limited to, a change in the grantee or any subcontractors identified in the supportive services grant agreement; a change in the area or community served by the grantee; additions or deletions of supportive services provided by the grantee; a change in category of participants to be served; and a change in budget line items that are more than 10 percent of the total supportive services grant award.

(1) VA's approval of changes is contingent upon the grantee's amended application retaining a high enough rank to have been competitively selected for funding in the year that the application was granted.

(2) Each supportive services grant modification request must contain a description of the revised proposed use of supportive services grant funds.

(b) VA may require that the grantee initiate, develop and submit to VA for approval a Corrective Action Plan (CAP) if, on a quarterly basis, actual supportive services grant expenditures vary from the amount disbursed to a grantee for that same quarter, or actual supportive services grant activities vary from the grantee's program description provided in the supportive services grant agreement.

(1) The CAP must identify the expenditure or activity source that has caused the deviation, describe the reason(s) for the variance, provide specific proposed corrective action(s), and provide a timetable for accomplishment of the corrective action.

(2) After receipt of the CAP, VA will send a letter to the grantee indicating that the CAP is approved or disapproved. If disapproved, VA will make beneficial suggestions to improve the proposed CAP and request resubmission, or take other actions in accordance with this part.

(Authority: 38 U.S.C. 501, 2044)

§ 62.61 Procedural error.

If an applicant would have been selected but for a procedural error committed by VA, VA may select that applicant for funding when sufficient funds become available if there is no material change in the information that would have resulted in the applicant's selection. A new application will not be required for this purpose.

(Authority: 38 U.S.C. 501, 2044)

§ 62.62 Religious organizations.

(a) Organizations that are religious or faith-based are eligible, on the same basis as any other organization, to participate in the Supportive Services for Veteran Families Program under this part. In the selection of applicants, the Federal government will not discriminate for or against an organization on the basis of the organization's religious character or affiliation.

(b)(1) No organization may use direct financial assistance from VA under this part to pay for any of the following:

(i) Inherently religious activities, such as religious worship, instruction, or proselytization; or

(ii) Equipment or supplies to be used for any of those activities.

(2) For purposes of this section, "indirect financial assistance" means Federal assistance in which a service provider receives program funds through a voucher, certificate, agreement, or other form of disbursement, as a result of the independent and private choices of individual beneficiaries. "Direct financial assistance" means Federal aid in the form of a grant, contract, or cooperative agreement where the independent choices of individual beneficiaries do not determine which organizations receive program funds.

(c) Organizations that engage in inherently religious activities, such as worship, religious instruction, or proselytization, must offer those services separately in time or location from any programs or services funded with direct financial assistance from VA under this part, and participation in any of the organization's inherently religious activities must be voluntary for the beneficiaries of a program or service funded by direct financial assistance from VA under this part.

(d) A religious organization that participates in the Supportive Services for Veteran Families Program under this part will retain its independence from Federal, State, or local governments and may continue to carry out its mission, including the definition, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from VA under this part to support any inherently religious activities, such as worship, religious instruction, or proselytization. Among other things, faith-based organizations may use space in their facilities to provide VA-funded services under this part, without removing religious art, icons, scripture, or other religious symbols. In addition, a VA-funded religious organization retains its authority over its internal government, and it may retain religious terms in its organization's name, select its board members and otherwise govern itself on a religious basis, and include religious reference in its organization's mission statement and other governing documents.

(e) An organization that participates in a VA program under this part must not, in providing direct program assistance, discriminate against a program beneficiary or a prospective program beneficiary regarding supportive services, financial assistance, or technical assistance, on the basis of religion or religious belief.

(f) If a State or local government voluntarily contributes its own funds to supplement federally funded activities, the State or local government has the option to segregate the Federal funds or commingle them. However, if the funds are commingled, this provision applies to all of the commingled funds.

(g) To the extent otherwise permitted by Federal law, the restrictions on inherently religious activities set forth in this section do not apply where VA funds are provided to religious organizations through indirect assistance as a result of a genuine and independent private choice of a beneficiary, provided the religious organizations otherwise satisfy the requirements of this part. A religious organization may receive such funds as the result of a beneficiary's genuine and independent choice if, for example, a beneficiary redeems a voucher, coupon, or certificate, allowing the beneficiary to direct where funds are to be paid, or a similar funding mechanism provided to that beneficiary and designed to give that beneficiary a choice among providers.

(Authority: 38 U.S.C. 501, 2044)

§ 62.63 Visits to monitor operations and compliance.

(a) VA has the right, at all reasonable times, to make visits to all grantee locations where a grantee is using supportive services grant funds in order to review grantee accomplishments and management control systems and to provide such technical assistance as may be required. VA may conduct inspections of all program locations and records of a grantee at such times as are deemed necessary to determine compliance with the provisions of this part. In the event that a grantee delivers services in a participant's home, or at a location away from the grantee's place of business, VA may accompany the grantee. If the grantee's visit is to the participant's home, VA will only accompany the grantee with the consent of the participant. If any visit is made by VA on the premises of the grantee or a subcontractor under the supportive services grant, the grantee must provide, and must require its subcontractors to provide, all reasonable facilities and assistance for the safety and convenience of the VA representatives in the performance of their duties. All visits and evaluations will be performed in such a manner as will not unduly delay services.

(b) The authority to inspect carries with it no authority over the management or control of any applicant or grantee under this part.

(Authority: 38 U.S.C. 501, 2044)

§ 62.70 Financial management and administrative costs.

(a) All grantees must comply with applicable requirements of the Single Audit Act Amendments of 1996 (31 U.S.C. 7501–7507) and revised OMB Circular A–133, "Audits of States, Local Governments, and Non-Profit Organizations," codified by VA at 38 CFR part 41.

(b) All grantees must use an adequate financial management system that follows generally accepted accounting principles and provides adequate fiscal control and accounting records, including cost accounting records that are supported by documentation. Such cost accounting must be reflected in the grantee's fiscal cycle financial statements to the extent that the actual costs can be determined for the program for which assistance is provided. Grantees must meet the applicable requirements of the appropriate OMB Circular for Cost-Principles.

(c) Grantees' financial management systems must comply with the requirements of § 49.21 of this part.

(d) Payment up to the amount specified in the supportive services grant must be made only for allowable, allocable, and reasonable costs in conducting the work under the supportive services grant. The determination of allowable costs must be made in accordance with the applicable Federal Cost Principles set forth in OMB Circular A–122, Cost Principles for Non-Profit Organizations, codified at 2 CFR part 235.

(e) Costs for administration by a grantee must not exceed 10 percent of the total amount of the supportive services grant. Administrative costs will consist of all direct and indirect costs associated with the management of the program. These costs will include the administrative costs, both direct and indirect, of subcontractors. For the purposes of the supportive services grant, all indirect costs are considered administrative costs, and, therefore, will not exceed 10 percent of the total supportive services grant.

(f) If indirect charges are claimed in the applicant's proposed budget, the applicant must provide on a separate sheet the following information:

(1) Name and address of the cognizant government audit agency (the agency that is providing the most Federal funds);

(2) Name, address, and phone number of the government auditor;

(3) Documentation from the cognizant agency indicating:

(i) Indirect cost rate and the base against which the rate should be applied;

(ii) Effective period (dates) for the rate; and

(iii) Date that the last rate was computed and negotiated.

(g) If no government audit agency computed and authorized the rate claimed, applicant must provide a brief explanation of computation, who computed it, and the date. If the applicant is awarded a supportive services grant, the proposed indirect rate must be submitted to a Federal audit agency within 90 days of award for approval.

(h) Grantees are subject to the Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and other Non-Profit Organizations, codified at 38 CFR part 49.

(Authority: 38 U.S.C. 501, 2044)

§ 62.71 Grantee reporting requirements.

(a) VA may require grantees to provide, in such form as may be prescribed, such reports or answers in writing to specific questions, surveys, or questionnaires as VA determines necessary to carry out the Supportive Services for Veteran Families Program.

(b) If, on a quarterly basis, actual supportive services grant expenditures vary from the amount disbursed to a grantee for that same quarter or actual supportive services grant activities vary from the grantee's program description provided in the supportive services grant agreement, grantees must report the deviation to VA.

(c) At least once per year, or at the frequency set by VA, each grantee must submit to VA a report containing information relating to operational effectiveness, fiscal responsibility, supportive services grant agreement compliance, and legal and regulatory compliance, including a description of the use of supportive services grant funds, the number of participants assisted, the types of supportive services provided, and any other information that VA may request.

(d) Grantees must relate financial data to performance data and develop unit cost information whenever practical.

(e) All pages of the reports must cite the assigned supportive services grant number and be submitted in a timely manner.

(f) Grantees must provide VA with consent to post information from reports on the Internet and use such information in other ways deemed appropriate by VA. Grantees shall clearly mark information that is confidential to individual participants.

(Authority: 38 U.S.C. 501, 2044)

§ 62.72 Recordkeeping.

Grantees must ensure that records are maintained for at least a 3 year period to document compliance with this part. Grantees must produce such records at VA's request.

(Authority: 38 U.S.C. 501, 2044)

§ 62.73 Technical assistance.

VA will provide technical assistance, as necessary, to eligible entities to meet the requirements of this part. Such technical assistance will be provided either directly by VA or through grants or contracts with appropriate public or non-profit private entities.

(Authority: 38 U.S.C. 501, 2044, 2064)

§ 62.80 Withholding, suspension, deobligation, termination, and recovery of funds by VA.

(a) *Recovery of funds.* VA will recover from the grantee any supportive services grant funds that are not used in accordance with the requirements of this part. VA will issue to the grantee a notice of intent to recover supportive services grant funds. The grantee will then have 30 days to submit documentation demonstrating why the supportive services grant funds should not be recovered. After review of all submitted documentation, VA will determine whether action will be taken to recover the supportive services grant funds.

(b) *VA actions when grantee fails to comply.* When a grantee fails to comply with the terms, conditions, or standards of the supportive services grant, VA may, on 7-days notice to the grantee, withhold further payment, suspend the supportive services grant, or prohibit the grantee from incurring additional obligations of supportive services grant funds, pending corrective action by the grantee or a decision to terminate in accordance with paragraph (c) of this section. VA will allow all necessary and proper costs that the grantee could not reasonably avoid during a period of suspension if such costs meet the provisions of the applicable Federal Cost Principles.

(c) *Termination.* Supportive services grants may be terminated in whole or in part only if paragraphs (c)(1), (c)(2), or (c)(3) of this section apply.

(1) By VA, if a grantee materially fails to comply with the terms and conditions of a supportive services grant award and this part.

(2) By VA with the consent of the grantee, in which case VA and the grantee will agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the grantee upon sending to VA written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. However, if VA determines in the case of partial termination that the reduced or modified portion of the supportive services grant will not accomplish the purposes for which the supportive services grant was made, VA may terminate the supportive services grant in its entirety under either paragraphs (c)(1) or (c)(2) of this section.

(d) *Deobligation of funds.* (1) VA may deobligate all or a portion of the amounts approved for use by a grantee if:

(i) The activity for which funding was approved is not provided in accordance with the approved application and the requirements of this part;

(ii) Such amounts have not been expended within a 1-year period from the date of the signing of the supportive services grant agreement;

(iii) Other circumstances set forth in the supportive services grant agreement authorize or require deobligation.

(2) At its discretion, VA may re-advertise in a Notice of Fund Availability the availability of funds that have been deobligated under this section or award deobligated funds to applicants who previously submitted applications in response to the most recently published Notice of Fund Availability.

(Authority: 38 U.S.C. 501, 2044)

§ 62.81 Supportive services grant closeout procedures.

Supportive services grants will be closed out in accordance with the following procedures upon the date of completion:

(a) No later than 90 days after the date of completion, the grantee must refund to VA any unobligated (unencumbered) balance of supportive services grant funds that are not authorized by VA to be retained by the grantee.

(b) No later than 90 days after the date of completion, the grantee must submit all financial, performance and other reports required by VA to closeout the supportive services grant. VA may authorize extensions when requested by the grantee.

(c) If a final audit has not been completed prior to the date of completion, VA retains the right to recover an appropriate amount after considering the recommendations on disallowed costs once the final audit has been completed.

(Authority: 38 U.S.C. 501, 2044)

[FR Doc. 2010–10372 Filed 5–4–10; 8:45 am]

BILLING CODE P

POSTAL SERVICE

39 CFR Part 111

Treatment of Cigarettes and Smokeless Tobacco as Nonmailable Matter

AGENCY: Postal Service™.

ACTION: Proposed rule.

SUMMARY: The Postal Service proposes to revise *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM®) 601.11, pertaining to the mailing of tobacco cigarettes and smokeless tobacco. These provisions implement specific requirements to be in compliance with the Prevent All Tobacco Cigarettes Trafficking (PACT) Act, Public Law No. 111–154, which restricts the mailability of cigarettes and smokeless tobacco.

DATES: Submit comments on or before May 17, 2010.

ADDRESSES: Mail or deliver written comments to the Manager, Mailing Standards, U.S. Postal Service, 475 L'Enfant Plaza, SW., Room 3436, Washington, DC 20260–3436. You may inspect and photocopy all written comments at USPS Headquarters Library, 475 L'Enfant Plaza, SW., 11th Floor North, Washington, DC, between 9 a.m. and 4 p.m., Monday through Friday. E-mail comments, containing the name and address of the commenter, may be sent to: *MailingStandards@usps.gov,* with a subject line of "PACT Act." Faxed comments are not accepted.

FOR FURTHER INFORMATION CONTACT: Anthony Alverno, 202–268–2997, or Mary Collins, 202–268–5440.

SUPPLEMENTARY INFORMATION:

On March 31, 2010, the Prevent All Cigarette Trafficking (PACT) Act of 2009, Public Law No. 111–154 was enacted. The Act's purposes include:

- Requiring Internet-based and other remote sellers of cigarettes and smokeless tobacco to comply with laws applied to other tobacco retailers;
- Creating disincentives for the illegal smuggling of tobacco products;
- Enhancing enforcement tools to deal with cigarette smuggling;
- Stemming trafficking;
- Increasing collection of federal, state, and local excise taxes on cigarettes and smokeless tobacco; and
- Preventing youth access through Internet and contraband sales.

Section 3 of the PACT Act pertains to the Postal Service and creates a new section 1716E of Title 18, U.S. Code. Section 3 of the PACT Act provides that, subject to certain exceptions, cigarettes, including roll-your-own tobacco and

smokeless tobacco are nonmailable. Exceptions in the PACT Act permit the mailing of cigarettes and/or smokeless tobacco in narrowly defined circumstances, as described below.

- *Noncontiguous States:* Intrastate shipments within Alaska or Hawaii;
- *Business/Regulatory Purposes:* Shipments transmitted between verified and authorized tobacco industry businesses for business purposes, or between such businesses and federal or state agencies for regulatory purposes;
- *Certain Individuals:* Infrequent, lightweight shipments mailed between adult individuals;
- *Consumer Testing:* Shipments of cigarettes sent by verified and authorized manufacturers to adult smokers for consumer testing purposes; and
- *Public Health:* Shipments by federal agencies for public health purposes under similar rules applied to manufacturers conducting consumer testing.

The PACT Act provides that the Postal Service cannot accept or transmit any package that it knows, or has reasonable cause to believe, contains nonmailable smokeless tobacco or cigarettes. The proposed rule explains that the Postal Service has reasonable cause to not accept for delivery or transmit a package based on:

- A statement on a publicly available Web site, or an advertisement, by any person that the person will mail matter which is nonmailable under this section in return for payment; or
- The fact that the mailer or other person on whose behalf a mailing is being made is on the U.S. Attorney General's List of Unregistered or Noncompliant Delivery Sellers.

Nonmailable cigarettes and smokeless tobacco deposited in the mail are subject to seizure and forfeiture. Senders of nonmailable cigarettes or smokeless tobacco are subject to criminal fines, imprisonment, and civil penalties.

Section 6 of the PACT Act provides that the nonmailability provisions, as well as the noncontiguous states exception, take effect 90 days after enactment. With respect to the remaining exceptions, the PACT Act requires the Postal Service to promulgate a final rule no later than 180 days after enactment of the PACT Act. 18 U.S.C. 1716E(b)(3)(B)(i), (4)(B)(i), (5)(C)(i). The Postal Service accordingly will attempt to publish a final rule effective June 29, 2010, that, at a minimum, will cover the general nonmailability provisions and the noncontiguous states exception. The Postal Service will attempt to issue a final rule to give effect to the remaining exceptions to the PACT Act as soon as possible, but no later than September 27, 2010.

The Postal Service offers the following observations on the various aspects of the proposed rule below.

Definitions: Consistent with the PACT Act, the proposed rule uses the definitions of cigarettes, roll-your-own tobacco, smokeless tobacco, cigars, consumer testing, and states found in federal law in Titles 15, 18, and 26 of the U.S. Code. As provided in 18 U.S.C. 1716E(b)(1), cigars are excluded from the mailability ban and therefore may be mailed regardless of any conditions required for the mailing of other applicable products under the PACT Act exceptions.

Mailability: The proposed rule incorporates the PACT Act mailability restrictions for cigarettes and smokeless tobacco.

Coverage of Exceptions: The PACT Act governs the permissibility of certain items within the Postal Service's mailstream network. The complex verification requirements for the PACT Act's exceptions, combined with the strict consequences of any noncompliance, render it impracticable for these requirements to be made applicable to mail originating or destinating outside of the Postal Service's service area. Therefore, the Postal Service does not believe that any alternative exists at this time to allow U.S. mailers to tender cigarettes and smokeless tobacco as outbound international mail or to receive them as inbound international mail under the PACT Act's exceptions. The proposed rule incorporates these principles by restricting the exceptions' applicability to domestic mail, but not to mail treated as domestic under *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) 608.2.2 or international mail as defined in DMM 608.2.3.

The applicability of these proposed rules to domestic mail under DMM 608.2.1 would include mail to, from, and between military installations, Army Post Offices (APOs), Fleet Post Offices (FPOs), and Diplomatic Post Offices (DPOs), except for mail treated as domestic under DMM 608.2.2. Delivery rules would apply to overseas military mail as practicable under the certain individuals' exception. Hold for Pickup service would not be required for delivery to APO, FPO, and DPO addresses.

Noncontiguous States Exception: The PACT Act permits the mailing of cigarettes and smokeless tobacco within the State of Alaska and within the State of Hawaii. 18 U.S.C. 1716E(b)(2). The proposed rule would require that intra-Alaskan and intra-Hawaiian shipments of cigarettes or smokeless tobacco:

- Be presented in a face-to-face transaction with a postal employee (thereby enabling acceptance personnel to verify that the shipment will destinate in the noncontiguous state of origin),
- Destinate in the state of origin,
- Bear a return address that is within the state of origin, and
- Be marked with the following exterior marking on the address side of the mailpiece: "INTRASTATE SHIPMENT OF CIGARETTES OR SMOKELESS TOBACCO."

Business/Regulatory Purposes Exception: Eligible mailers and recipients under the business/regulatory purposes exception include federal and state agencies, 18 U.S.C. 1716E(b)(3)(A)(ii), as well as "legally operating businesses that have all applicable State and Federal Government licenses or permits and are engaged in tobacco product manufacturing, distribution, wholesale, export, import, testing, investigation, or research." 18 U.S.C. 1716E(b)(3)(A)(i). The PACT Act charges the Postal Service with verifying that any person submitting an otherwise nonmailable tobacco product into the mails, and any person receiving such a product through the mails, as authorized under the business/regulatory purposes exception, is a business or government agency within the scope of the exception. 18 U.S.C. 1716E(b)(3)(B)(ii)(I)–(II).

The Postal Service proposes to require that each customer seeking to avail itself of this exception submit an application to the manager, Pricing and Classification Service Center (PCSC). The application requires the customer to furnish information about its legal status, any applicable licenses, and authority under which it operates. In addition, the applicant would be required to furnish similar information for all entities to which its mailings under this exception are addressed and to identify all locations where the applicant will present mail containing cigarettes and smokeless tobacco. The applicant would be required to update this information anytime it intends to mail to an entity or at a location not previously on its list. Only those shipments addressed to designated recipients and presented at designated locations would be eligible for the business/regulatory purposes exception. Before tendering any shipment under this exception, the mailer must present proof that the Postal Service has

authorized the mailer to tender such shipments at that location.

Based on information furnished in the customer's application, the Postal Service will make determinations of eligibility to mail under this exception. The applicant bears the burden of establishing its and its recipients' eligibility as legally operating businesses that have all applicable state and federal government licenses or permits and that are engaged in tobacco product manufacturing, distribution, wholesale, export, import, testing, investigation, or research; or, in the case of mailings for regulatory purposes, the applicant's or its recipient's status as a federal or state agency. Customers whose applications or amendments to existing applications are denied in whole or in part may appeal to the manager, PCSC. The proposed rule provides that eligibility to mail under the business/regulatory purposes exception may be revoked by the manager, PCSC, in the event of failure to comply with any applicable rules and regulations. Decisions by the manager, PCSC, to uphold the denial of an application or to revoke a customer's eligibility under the business/regulatory purposes exception may be appealed to the Judicial Officer under 39 CFR part 953. In order to ensure that eligibility determinations remain current, the proposed rule provides that any authorization to mail under this exception will lapse if the mailer does not actually tender any such mail during any six-month period, and that the mailer must submit a new application for eligibility for any future mailings after that point.

The PACT Act requires that eligible shipments under this exception be sent via mail classes that provide for the "tracking and confirmation of the delivery." 18 U.S.C. 1716E(b)(3)(B)(ii)(III). The mail service that fulfills this requirement is Express Mail service, which offers tracking information and confirmation of delivery. Consequently, the proposed rule specifies that eligible shipments under the business/regulatory purposes exception would be required to use Express Mail service.

The PACT Act provides that eligible mailings be "marked with marking that makes it clear to employees of the United States Postal Service that it is a permitted mailing of otherwise nonmailable tobacco products that may be delivered only to a permitted government agency or business and may not be delivered to any residence or individual person." 18 U.S.C. 1716E(b)(3)(B)(ii)(VI). The Postal Service accordingly proposes that each mailing tendered under the business/regulatory purposes exception bear the following marking: "PERMITTED TOBACCO PRODUCT—DELIVER ONLY TO ADDRESSED BUSINESS/AGENCY— RECIPIENT MUST FURNISH PROOF OF AGE AND EMPLOYMENT OR AGENCY." The marking would be required to appear on the exterior of the address side of the mailing container.

The PACT Act requires that the Postal Service maintain information, to include "the identity of the business or government entity submitting the mailing containing otherwise nonmailable tobacco products for delivery and the identity of the business or government entity receiving the mailing" for a three-year period beginning on the date of the mailing. 18 U.S.C. 1716(b)(3)(B)(ii)(IV)–(V). Such information must be made available to designated law enforcement agencies during the designated period of retention. The Postal Service understands this retention requirement to apply to sender and recipient name and address information for each mailing. Currently, the Postal Service does not organize or retain handwritten or typed Express Mail mailing labels for the designated statutory retention period. To comply with this requirement, the Postal Service proposes that all customers seeking to mail under this exception use Express Mail service with Return Receipt. The Return Receipt must bear the sender's eligibility number issued by the PCSC as well as the addressee's full name and address, and be made returnable to the manager, PCSC, which will retain the record for the requisite period. Further, the business or government name and full mailing address of the sender and recipient would be required to appear on the Express Mail label, and match those listed on the customer's application on file with the Postal Service. 18 U.S.C. 1716E(b)(3)(B)(ii)(IV).

The PACT Act provides that eligible mailings under the business/regulatory purposes exception "be delivered only to a verified employee of the recipient business or government agency, who is not a minor and who shall be required to sign for the mailing." 18 U.S.C. 1716E(b)(3)(B)(ii)(VII). For this exception, the term "minor" is defined as "an individual who is less than the minimum age required for the legal sale or purchase of tobacco products as determined by applicable law at the place the individual is located." 18 U.S.C. 1716E(b)(3)(C). To implement this requirement, the proposed rule would require that Express Mail service be used without the option for waiver of signature. Further, to ensure that delivery is effected on a person who is a representative of the company and not a minor, the proposed rule would require that all Express Mail shipments under this exception be required to be delivered using Hold for Pickup service. Hold for Pickup is shipped directly to a postal retail location, in lieu of being deposited at the recipient's address. The package is held until the recipient retrieves it during retail office hours. This measure would reduce the potential that underage or unauthorized individuals may receive a nonmailable shipment of cigarettes or smokeless tobacco. Furthermore, the recipient would be required to furnish proof of age through production of a driver's license, passport, or other government-issued photo identification that lists age or date of birth, as well as proof that the recipient is an employee or agent of the business or government entity identified on the mailing label.

Certain Individuals: The exception for certain individuals generally permits the mailing of small quantities of cigarettes or smokeless tobacco sent non-commercially by individual adults to businesses or other adults. 18 U.S.C. 1716E(b)(4)(A). Such shipments can include, but are not limited to, the following:

- Cigarettes and smokeless tobacco exchanged as gifts between individual adults; and
- The return by a consumer of a damaged or unacceptable tobacco product to the manufacturer.

For purposes of the certain individuals' exception, the PACT Act requires the Postal Service to "verify that any person submitting an otherwise nonmailable tobacco product into the mails * * * is the individual identified on the return address label of the package and is not a minor." 18 U.S.C. 1716E(b)(4)(B)(ii)(I). Further, for a mailing addressed to an individual recipient, the PACT Act specifies that the sender affirm that the recipient is not a minor. 18 U.S.C. 1716E(b)(4)(B)(ii)(II). For purposes of this exception, a minor is "an individual who is less than the minimum age required for the legal sale or purchase of tobacco products as determined by applicable law at the place the individual is located." 18 U.S.C. 1716E(b)(4)(C).

To give effect to these statutory requirements, the proposed rule provides that shipments by individuals of cigarettes or smokeless tobacco would be required to bear the sender's name in the return address, and that such shipments be presented in a face-to-face transaction with a postal employee. In

this manner, the Postal Service would be able to discharge its obligation to verify the sender's age and confirm that the sender's identification matches the name listed in the return address. Age and identity would be verified through the use of government-issued photo identification that lists age or date of birth, such as a driver's license or passport. Further, for shipments addressed to an individual, the proposed rule would require that the recipient's first and last name appear in the address block (in lieu of a generic descriptor, such as "resident" or "occupant") on the mailpiece. To fulfill the requirements of the PACT Act, the proposed rule specifies that at the time of the mailing, the customer would be required to orally affirm to the accepting postal employee that the recipient is not a minor under the laws applicable to the recipient at the destination location.

The PACT Act also specifies additional quantity and frequency limitations on the certain individuals' exception. In particular, such mailings cannot weigh in excess of 10 ounces. 18 U.S.C. 1716E(b)(4)(B)(ii)(III). Shipments entered under this exception are capped at no more than 10 mailings in any 30-day period. 18 U.S.C. 1716E(b)(4)(B)(ii)(VII). Further, as with the business/regulatory purposes exception, such mailings may only be sent via mail classes that provide for the "tracking and confirmation of the delivery." 18 U.S.C. 1716E(b)(4)(B)(ii)(IV). Again, the mail service that fulfills this requirement is Express Mail, which offers tracking information and confirmation of delivery. As explained above, the proposed rule specifies that eligible shipments under the certain individuals' exception would be required to use Express Mail with Hold for Pickup service.

The PACT Act provides that mailings under the certain individuals' exception "shall not be delivered or placed in the possession of any individual who has not been verified as not being a minor." 18 U.S.C. 1716E(b)(4)(B)(ii)(V). To implement this requirement, the proposed rule would require that Express Mail be delivered in the context of a face-to-face interaction between the recipient and postal employee, thereby enabling age verification. Each piece would be required to be marked with a special marking, thereby triggering the need for age verification at delivery: "PERMITTED TOBACCO PRODUCT—DELIVER ONLY TO AGE-VERIFIED ADULT OF LEGAL AGE." To ensure that delivery is effected on a person who is not a minor, the proposed rule would require that Express Mail shipments (other than Express Mail shipments to APO, FPO, or DPO addresses) under this exception be delivered using Hold for Pickup service, whereby the shipment would be held at a postal retail unit for pickup by the recipient. Further, the recipient would be required to furnish proof of age through production of a driver's license, passport, or other government-issued photo identification that lists age or date of birth.

The proposed rule provides that eligibility to mail under the certain individuals' exception may be revoked by the manager, PCSC, in the event of failure to comply with any applicable rules and regulations. A customer may appeal an adverse decision to the manager, Mailing Standards. Decisions by the manager, Mailing Standards, to revoke a customer's eligibility under this exception may be appealed to the Judicial Officer under 39 CFR part 953.

Consumer Testing: The exception for consumer testing permits a legally operating cigarette manufacturer (or legally authorized agent) to mail cigarettes to verified adult smokers solely for consumer testing purposes. 18 U.S.C. 1716E(b)(5)(A). Consumer testing is defined in the PACT Act as "testing limited to formal data collection and analysis for the specific purpose of evaluating the product for quality assurance and benchmarking purposes of cigarette brands or sub-brands among existing adult smokers." 18 U.S.C. 1716E(b)(5)(D)(ii). Notably, the statutory exception applies only to cigarettes and cigarette manufacturers (or legally authorized agents) and not to smokeless tobacco or non-manufacturer participants in the tobacco industry.

The PACT Act limits eligibility to cigarette manufacturers that have "a permit, in good standing, issued under section 5713 of the Internal Revenue Code of 1986" and the legally authorized agents of such manufacturers. 18 U.S.C. 1716E(b)(5)(A)(i). The PACT Act requires the Postal Service to "verify that any person submitting a tobacco product into the mails under this paragraph is a legally operating cigarette manufacturer permitted to make a mailing under this paragraph, or an agent legally authorized by the legally operating cigarette manufacturer to submit the tobacco product into the mails on behalf of the manufacturer." 18 U.S.C. 1716E(b)(5)(C)(ii)(I). As with the business/regulatory purposes exception, the Postal Service intends to discharge this obligation by requiring customers to submit an application to the manager, PCSC, for eligibility to mail under this exception. The application would require the applicant to provide information to establish that the customer, or the customer's principal if the customer is a manufacturer's agent, is a cigarette manufacturer in good standing under 26 U.S.C. 5713. In addition, the applicant would be required to identify all locations where mail containing cigarettes for consumer testing will be presented. Any changes to the customer's information or entry locations would require a subsequently filed amendment to the customer's application. As part of its application, the customer would sign a certification to the effect that the customer will comply with the following PACT Act requirements, 18 U.S.C. 1716E(b)(5)(C)(ii)(II)–(III):

- Any recipient of consumer testing shipments of cigarettes is an adult established smoker;
- No recipient has made any payment for the cigarettes;
- Any recipient will sign a written statement to the effect indicating that the recipient wishes to receive the mailings;
- The manufacturer or the legally authorized agent of the manufacturer will offer the opportunity for any recipient to withdraw the recipient's written statement at least once in every three-month period; and
- Any package mailed under this exception will contain not more than 12 packs of cigarettes (240 cigarettes), on which all taxes levied by the destination state and locality have been paid and all related destination state tax stamps or other tax-payment indicia have been applied.

To facilitate administration and enforcement of this exception, the proposed rule also requires that the customer certify that it will maintain records establishing compliance with these obligations for a three-year period from the date of each mailing. Customers must provide copies of records establishing compliance to the manager, PCSC, upon request no later than ten business days after the date of the request. Before tendering any shipment under this exception, the mailer must present proof that the Postal Service has authorized the mailer to tender such shipments at that location.

Customers whose applications are denied by the Manager, PCSC, may appeal to the manager, Mailing Standards. The proposed rule provides that eligibility to mail under the consumer testing exception may be revoked by the manager, Mailing Standards, in the event of failure to comply with any applicable rules and regulations. Decisions by the manager, Mailing Standards, to uphold the denial of an application or to revoke a

customer's eligibility under the consumer testing exception may be appealed to the Judicial Officer under 39 CFR part 953. To ensure that eligibility determinations remain current with respect to mailers' behavior, the proposed rule provides that any authorization to mail under this exception would lapse if the mailer does not actually tender any such mail during any six-month period, and that the mailer must submit a new application for eligibility for any future mailings after that point.

The PACT Act establishes quantity, frequency, and other limitations. The proposed rule accordingly limits quantity to twelve packs of cigarettes per package and frequency of no more than one package from any one manufacturer to an adult smoker during any 30-day period. 18 U.S.C. 1716E(b)(5)(A)(ii)–(iii). The proposed rule also implements PACT Act requirements for payment of destination state and locality taxes and the use of tax stamps or other indicia. 18 U.S.C. 1716E(b)(5)(A)(iv). Additionally, the proposed rule incorporates conditions for consumer testing:

- That no payment by the recipient for the cigarettes is permitted;
- The recipient must be paid a fee for participation in consumer tests;
- The recipient must evaluate the cigarettes and provide feedback to the manufacturer in connection with the consumer test; and
- The total calendar-year distribution of cigarettes under the consumer testing exception may not exceed one percent of the manufacturer's total cigarette sales for the prior calendar year. 18 U.S.C. 1716E(b)(5)(A)(v)(I)–(III), (B)(ii).

Consistent with the PACT Act, the mailing of cigarettes for consumer testing purposes would not be permitted to states that prohibit the delivery of cigarettes to individuals, and these rules shall not preempt, limit, or otherwise affect any related state laws. 18 U.S.C. 1716E(b)(5)(B)(i). The proposed rule provides that customers maintain records to establish compliance with all of these requirements for three years.

The PACT Act requires that eligible shipments under this exception be sent via mail systems that provide for the "tracking and confirmation of the delivery." 18 U.S.C. 1716E(b)(5)(C)(ii)(IV). As explained above, the mail service that fulfills this requirement is Express Mail service, which offers tracking information and confirmation of delivery. Consequently, the proposed rule specifies that eligible shipments under the consumer testing exception would be required to use Express Mail service.

The PACT Act provides that eligible mailings under the consumer testing exception be delivered "only to the named recipient and only after verifying that the recipient is an adult." 18 U.S.C. 1716E(b)(5)(C)(ii)(VII). For purposes of the consumer testing exception, the term "adult" is defined in this exception as "an individual who is not less than 21 years of age." 18 U.S.C. 1716E(b)(5)(D)(i). To implement this requirement, the proposed rule would require that Express Mail service be used without the option for waiver of signature. Further, to ensure that delivery is effected on a person who is the named individual on the package and at least 21 years of age, the proposed rule would require that all Express Mail shipments under this exception be required to be delivered using Hold for Pickup service. For age and identity verification, the recipient would be required to furnish proof of age through production of a driver's license, passport, or other government-issued photo identification that lists age or date of birth.

The PACT Act provides that eligible mailings "be marked with marking that makes it clear to employees of the United States Postal Service that it is a permitted mailing of otherwise nonmailable tobacco products that may be delivered only to the named recipient after verifying that the recipient is an adult." 18 U.S.C. 1716E(b)(5)(C)(ii)(VI). The Postal Service accordingly proposes that each mailing tendered under the consumer testing exception bear the following marking: "PERMITTED TOBACCO PRODUCT—DELIVER ONLY TO ADDRESSEE UPON AGE VERIFICATION—AGE 21 OR ABOVE." The marking would be required to appear on the exterior of the address side of the mailing container, so as to ensure that eligible shipments are correctly identified as falling under the consumer testing exception.

The PACT Act requires that the Postal Service maintain records "relating to a mailing" under the consumer testing exception for a three-year period beginning on the date of the mailing. 18 U.S.C. 1716E(b)(5)(C)(ii)(V). Such information must be made available to certain law enforcement agencies during the designated period of retention. The Postal Service understands this retention requirement to apply to mailing information, including sender and address information, for each mailing. Currently, the Postal Service does not organize or retain handwritten or typed Express Mail mailing labels for the designated statutory retention period. To comply with this requirement, the Postal Service proposes that customers seeking to mail under this exception use Express Mail service with Return Receipt. The Return Receipt must bear the sender's eligibility number issued by the PCSC, as well as the addressee's full name and address, and be made returnable to the Manager, PCSC, who will retain the record for the requisite period.

Public Health: The PACT Act provides that federal government agencies "involved in the consumer testing of tobacco products solely for public health purposes may mail cigarettes under the same requirements, restrictions, and rules and procedures that apply to consumer testing mailings of cigarettes by manufacturers," with the exception that the agency shall not be required to pay recipients for participating in testing. 18 U.S.C. 1716E(b)(6). The proposed rule accordingly creates a public health exception for federal agencies. This exception is made subject to the same mailing standards as those applied to manufacturers involved in consumer testing, with the exception that federal agencies do not need to comply with the mailing standard requiring that the customer certify that the recipient is being paid a fee for participation in consumer tests.

The Postal Service accordingly invites comments on the following proposed revision of the *Mailing Standards of the United States Postal Service,* Domestic Mail Manual, incorporated by reference in the *Code of Federal Regulations. See* 39 CFR 111.

List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

Accordingly, 39 CFR part 111 is proposed to be amended as follows:

PART 111—[AMENDED]

1. The authority citation for 39 CFR part 111 is revised to read as follows:

Authority: 5 U.S.C. 552(a); 13 U.S.C. 301–307; 18 U.S.C. 1692–1737; 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001–3011, 3201–3219, 3403–3406, 3621, 3622, 3626, 3632, 3633, and 5001.

2. Revise the following sections of *Mailing Standards of the United States Postal Service,* Domestic Mail Manual (DMM) as follows:

Mailing Standards of the United States Postal Service, Domestic Mail Manual (DMM)

* * * * *

600 Basic Standards for All Mailing Services

601 Mailability

* * * * *

[Renumber current 601.11 and 12 as new 12 and 13, and add new 11 as follows:]

11 Cigarettes and Smokeless Tobacco

11.1 Definitions

For this standard, we define terms as follows:

a. *Cigarette:* any roll of tobacco wrapped in paper or in any substance not containing tobacco, and any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette. The term cigarette includes roll-your-own tobacco and excludes cigars.

b. *Smokeless tobacco:* any finely cut, ground, powdered, or leaf tobacco that is intended to be placed in the oral or nasal cavity or otherwise consumed without being combusted.

c. *Cigar:* any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco, unless, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, the product is likely to be offered to, or purchased by, consumers as a cigarette.

d. *Roll-your-own tobacco:* any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes or cigars, or for use as wrappers thereof.

e. *Consumer testing:* testing limited to formal data collection and analysis for the specific purpose of evaluating the product for quality assurance and benchmarking purposes of cigarette brands or sub-brands among existing adult smokers.

f. *State:* any of the 50 states of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

11.2 Nonmailability

Except as provided in 11.8.3, all cigarettes (including roll-your-own tobacco) and smokeless tobacco are nonmailable and shall not be deposited in or carried through the Postal Service mailstream. The Postal Service will not accept for delivery or transmit any package that it knows, or has reasonable cause to believe, contains nonmailable cigarettes or smokeless tobacco. In the event the Postal Service reasonably suspects that a mailer is tendering nonmailable cigarettes or smokeless tobacco, then the mailer bears the burden of proof in establishing eligibility to mail. Nonmailable cigarettes and smokeless tobacco deposited in the mail are subject to seizure and forfeiture. Any nonmailable cigarettes and smokeless tobacco products seized and forfeited shall be destroyed or retained by the Federal Government for the detection or prosecution of crimes or related investigations and then destroyed. Senders of nonmailable cigarettes and smokeless tobacco may be subject to seizure and forfeiture of assets, criminal fines, imprisonment, and civil penalties. The Postal Service has reasonable cause not to accept for delivery or transmit a package based on:

a. A statement on a publicly available website, or an advertisement, by any person that the person will mail matter which is nonmailable under this section in return for payment; or

b. The fact that the mailer or other person on whose behalf a mailing is being made is on the U.S. Attorney General's List of Unregistered or Noncompliant Delivery Sellers.

11.3 Mailability Exceptions

Cigarettes and smokeless tobacco are mailable if one of the conditions in 11.4 through 11.8 is met. These exceptions only apply to domestic mail under 608.2.1, including mail to, from, and between military installations and Army Post Office (APO), Fleet Post Office (FPO), and Diplomatic Post Office (DPO) addresses, with the exception that delivery procedures for overseas military mail under the certain individuals' exception in 11.6 may vary as practicable. These exceptions do not apply to mail treated as domestic under 608.2.2 or international mail as defined in 608.2.3.

11.4 Mailing Within Noncontiguous States

Intra-Alaskan and intra-Hawaiian shipments of cigarettes or smokeless tobacco are mailable, provided that such mailings:

a. Are presented in a face-to-face transaction with a postal employee within the state;

b. Destinate in the same state of origin;

c. Bear a valid complete return address that is within the state of origin; and

d. Are marked with the following exterior marking on the address side of the mailpiece: "INTRASTATE SHIPMENT OF CIGARETTES OR SMOKELESS TOBACCO."

11.5 Exception for Business/Regulatory Purposes

Eligibility to mail and to receive mail under the business/regulatory purposes exception is limited to federal and state government agencies and legally operating businesses that have all applicable state and federal government licenses or permits and are engaged in tobacco product manufacturing, distribution, wholesale, export, import, testing, investigation, or research, only under the conditions in 11.5.1 through 11.5.3.

11.5.1 Application

Each customer seeking to mail cigarettes or smokeless tobacco under the business/regulatory purposes exception must complete an application letter requesting to mail under the business/regulatory purposes exception.

a. The applicant must furnish:

1. Information about its legal status, any applicable licenses, and authority under which it operates;

2. Information about the legal status, any applicable licenses, and operational authority for all entities to which the applicant's mailings under this exception will be addressed; and

3. All locations where mail containing cigarettes and smokeless tobacco will be presented.

The applicant must update this information anytime it intends to mail to an entity not on its list. Only those shipments containing otherwise nonmailable tobacco addressed to recipients on the customer's list of designated recipients would be eligible for the business/regulatory purposes exception.

b. The applicant must establish its and its recipients' eligibility as legally operating businesses that have all applicable state and federal government licenses or permits and are engaged in tobacco product manufacturing, distribution, wholesale, export, import, testing, investigation, or research; or, in the case of mailings for regulatory purposes, as a federal or state agency.

c. Applications must be mailed to the manager, Pricing & Classification Service Center (PCSC), *see* 608.8.0 for address. The manager, PCSC, issues the initial agency decision of a determination of eligibility to mail under the business/regulatory purposes exception.

d. Customers whose applications or amendments to existing applications are denied in whole or in part may appeal to the manager, Mailing Standards (*see* 608.8.0).

e. Eligibility to mail under the business/regulatory purposes exception

may be revoked by the manager, Mailing Standards, in the event of failure to comply with any applicable rules and regulations. Decisions by the manager, Mailing Standards, to uphold the denial of an application or to revoke a customer's eligibility under the business/regulatory purposes exception may be appealed to the Judicial Officer under 39 CFR part 953.

f. Upon written request by a state or federal agency, the manager, Mailing Standards, may, in his or her discretion, waive certain application requirements for mailings entered by the requesting state or federal agency for regulatory purposes.

g. Any determination of eligibility to mail under this exception shall lapse if the authorized mailer does not tender any mail under this exception within any six-month period. After that time, the affected mailer must apply for and receive new authorization for any mailings under this exception.

11.5.2 Mailing

Customers eligible to mail under the business/regulatory purposes exception may enter mailings of cigarettes and smokeless tobacco only at the locations specified in the customer's application. Before mailing any shipment under this exception, the mailer must present proof that the PCSC has authorized the mailer to mail such shipments at that location. All mailings under the business/regulatory purposes exception must:

a. Be entered as Express Mail with Hold for Pickup service (waiver of signature not permitted) (*see* 113);

b. Be accompanied by a request for return receipt (PS Form 3811, *see* 503.6), which must bear the sender's eligibility number issued by the PCSC as well as the addressee's full name and address, and be made returnable to the manager, PCSC — Tobacco Mailing Unit (*see* 608.8.0 for address), which will retain the record for a three-year period;

c. Bear the marking "PERMITTED TOBACCO PRODUCT—DELIVER ONLY TO ADDRESSED BUSINESS/AGENCY—RECIPIENT MUST FURNISH PROOF OF AGE AND EMPLOYMENT OR AGENCY." on the address side of the mailpiece; and

d. bear the business or government agency name and full mailing addresses of both the sender and recipient, both of which must match exactly those listed on the customer's application on file with the Postal Service.

11.5.3 Delivery

Mailings bearing the marking for business/regulatory purposes can only be delivered to a verified employee of the addressee business or government agency. The recipient must show proof that he or she is an employee or agent of the business or government identified as the addressee on the mailing label. Delivery is completed under the following conditions:

a. The recipient must be an adult of at least the minimum age for the legal sale or purchase of tobacco products at the place of delivery. The recipient must furnish proof of age via a driver's license, passport, or other government-issued photo identification that lists age or date of birth.

b. Once age and the recipient's identity as an employee or agent of the addressee are established, the recipient must sign PS Form 3849 and PS Form 3811 in the appropriate signature blocks.

11.6 Exception for Certain Individuals

The exception for certain individuals permits the mailing of small quantities of cigarettes or smokeless tobacco by individual adults to businesses or to other adults. Such shipments may include, but are not limited to, cigarettes and smokeless tobacco exchanged as gifts between individual adults and a damaged or unacceptable tobacco product returned by a consumer to the manufacturer. Eligibility to mail under the certain individuals' exception may be revoked by the manager, PCSC, in the event of failure to comply with any applicable rules and regulations. A customer may appeal an adverse initial decision to the manager, Mailing Standards (*see* 608.8.0). The mailer bears the burden of proof in establishing eligibility in the event of revocation. Decisions by the manager, Mailing Standards, to revoke a customer's eligibility under this exception may be appealed to the Judicial Officer under 39 CFR part 953. Mailings under this exception must be made under the conditions in 11.6.1 through 11.6.3.

11.6.1. Entry and Acceptance

Mailings under the certain individuals' exception must be entered under the following conditions:

a. Cigarettes or smokeless tobacco may only be mailed via a face-to-face transaction with a postal employee.

b. Cigarettes or smokeless tobacco may only be entered by an adult of at least the minimum age for the legal sale or purchase of tobacco products at the place of entry.

c. The individual presenting the mailing must furnish government-issued photo identification that lists age or date of birth, such as a driver's license or passport, at the time of the mailing. The name on the identification must match the name of the sender appearing in the return address block of the mailpiece.

d. For mailings addressed to an individual, at the time the mailing is presented, the customer must orally confirm that the addressee is an adult of at least the minimum age for the legal sale or purchase of tobacco products at the place of delivery.

11.6.2 Mailing

No customer may send or cause to be sent more than 10 mailings under this exception in any 30-day period. All mailings under the certain individual's exception must:

a. Be entered as Express Mail with Hold for Pickup service requested (except overseas military mail shipments (waiver of signature not available)); *see* 113.

b. Bear the marking "PERMITTED TOBACCO PRODUCT—DELIVER ONLY TO AGE-VERIFIED ADULT OF LEGAL AGE" on the address side of the exterior of the mailpiece;

c. Bear the full name and mailing address of the sender and recipient on the Express Mail label;

d. Weigh no more than 10 ounces.

11.6.3 Delivery

Delivery under the certain individuals' exception is made under the following conditions:

a. The recipient signing for the Express Mail article must be an adult of at least the minimum age for the legal sale or purchase of tobacco products at the place of delivery.

b. The recipient must furnish proof of age via a driver's license, passport, or other government-issued photo identification that lists age or date of birth.

c. Once age is established, the recipient must sign PS Form 3849 in the appropriate signature block.

11.7 Exception for Consumer Testing

The exception for consumer testing permits a legally operating cigarette manufacturer or a legally authorized agent of a legally operating cigarette manufacturer to mail cigarettes to verified adult smokers solely for consumer testing purposes. The manufacturer for which mailings are entered under this exception must have a permit, in good standing, issued under 26 U.S.C. 5713. The consumer testing exception applies only to cigarettes and not smokeless tobacco. Items must be mailed under conditions in 11.7.1 through 11.7.3.

11.7.1 Application

Each customer seeking to mail cigarettes under the consumer testing

exception must submit an application letter to mail under consumer testing exception. The applicant must furnish:

a. Information to establish that the customer, or the customer's principal if the customer is a manufacturer's agent, is a cigarette manufacturer in good standing under 26 U.S.C. 5713;

b. If the customer is an agent of a manufacturer, complete details about the agency relationship with the manufacturer; and

c. All locations where mail containing cigarettes for consumer testing will be presented.

d. As part of its application, the applicant must certify in writing that it will comply with the following requirements:

1. Any recipient of consumer testing samples of cigarettes is an adult established smoker;

2. No recipient has made any payment for the cigarettes;

3. Every recipient will sign a statement indicating that the recipient wishes to receive the mailings;

4. The manufacturer or the legally authorized agent of the manufacturer will offer the opportunity for any recipient to withdraw the recipient's written statement at least once in every three-month period;

5. Any package mailed under this exception will contain not more than 12 packs of cigarettes (maximum of 240 cigarettes) on which all taxes levied on the cigarettes by the state and locality of delivery have been paid and all related state tax stamps or other tax-payment indicia have been applied; and

6. The manufacturer will maintain records establishing compliance with these obligations for a three-year period from the date of each mailing.

e. The applicant must establish its eligibility by submitting applications to the manager, Pricing & Classification Service Center (PCSC).

f. The applicant must provide any requested copies of records establishing compliance to the manager, PCSC (*see* 608.8.0), and/or the manager, Mailing Standards (*see* 608.8.0), upon request no later than 10 business days after the date of the request.

g. The manager, PCSC, issues the initial agency decision of a determination of eligibility to mail under the consumer testing exception. Customers whose applications are denied in whole or in part may appeal to the manager, Mailing Standards. Eligibility to mail under the consumer testing exception may be revoked by the manager, Mailing Standards, in the event of failure to comply with any applicable rules and regulations. Decisions by the manager, Mailing Standards, to uphold the denial of an application or to revoke a customer's eligibility under the consumer testing exception may be appealed to the Judicial Officer under 39 CFR part 953.

h. Any determination of eligibility to mail under this exception shall lapse if the authorized mailer does not tender any mail under this exception within any six-month period. After that time, the affected mailer must apply for and receive new authorization for any further mailings under this exception.

11.7.2 Mailing

Customers eligible to mail under the consumer testing exception may enter mailings of cigarettes only at the locations specified in the customer's application and under the following conditions:

a. Before tendering any shipment under this exception, the mailer must present proof that the PCSC has authorized the mailer to tender such shipments at that location.

b. All mailings under the consumer testing exception:

1. Must be entered as Express Mail with Hold for Pickup service requested (waiver of signature not available); *see* 113.

2. Be accompanied by a request for return receipt (PS Form 3811; *see* 503.6), which must bear the sender's eligibility number issued by the PCSC, as well as the addressee's full name and address, and be made returnable to the manager, PCSC—Tobacco Mailing Unit (*see* 608.8.0 for address);

3. Must bear the marking "PERMITTED TOBACCO PRODUCT—DELIVER ONLY TO ADDRESSEE UPON AGE VERIFICATION—AGE 21 OR ABOVE" on the address side of the exterior of the mailpiece;

4. Must bear the full mailing addresses of both the sender and recipient on the Express Mail label. The name and address of the sender must match exactly those listed on the customer's application on file with the PCSC;

5. Are limited in tobacco contents to no more than 12 packs of cigarettes (maximum 240 cigarettes) on which all taxes levied on the cigarettes by the destination state and locality have been paid and all related state tax stamps or other tax-payment indicia have been applied;

6. May not be addressed to an addressee residing in a state that prohibits the delivery or shipment of cigarettes to individuals in the destination state;

7. May be sent only to an addressee who has not made any payment for the cigarettes, is being paid a fee for participation in consumer tests, and has agreed to evaluate the cigarettes and furnish feedback to the manufacturer in connection with the consumer test.

c. Customers must maintain records to establish compliance with the requirements in 11.7.

d. Mailing frequency may not exceed more than one package from any manufacturer to an adult smoker during any 30-day period.

e. Nothing in these rules shall preempt, limit, or otherwise affect any related state laws.

11.7.3 Delivery

Mailings bearing the marking for consumer testing can only be delivered to the named addressee under the following conditions:

a. The recipient signing for the Express Mail Hold for Pickup service (see 113) article must be an adult of at least 21 years of age.

b. The recipient must furnish proof of age through production of a driver's license, passport, or other government-issued photo identification that lists age or date of birth.

c. The name on the identification must match the name of the addressee on the Express Mail label.

d. Once age is established, the recipient must sign the PS Form 3849 and PS Form 3811 in the appropriate signature blocks.

11.8 Public Health Exception

Federal government agencies involved in the consumer testing of tobacco products solely for public health purposes may mail cigarettes under the mailing standards of 11.7, except as provided herein. The federal agency shall not be subject to the requirement that the recipient be paid a fee for participation in consumer tests. Upon written request, the manager, Mailing Standards, may, in his or her discretion, waive certain of the application requirements.

* * * * *

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes when the proposal is adopted.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 2010–10660 Filed 5–3–10; 4:15 pm]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R10–OAR–2007–0112; FRL–9144–9]

Approval and Promulgation of State Implementation Plans: Washington

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve State Implementation Plan (SIP) revisions submitted by the State of Washington, Department of Ecology (Ecology). These revisions pertain to the maintenance plan prepared by the State of Washington to maintain the 8-hour national ambient air quality standard (NAAQS) for ozone in the Vancouver portion of the Portland/Vancouver Air Quality Maintenance Area (Pdx/Van AQMA). The 110(a)(1) maintenance plan for this area meets Clean Air Act (CAA) requirements and demonstrates that the Vancouver portion of the Pdx/Van AQMA will be able to remain in attainment for 1997 and 2008 ozone NAAQS through 2015. EPA is proposing full approval of the maintenance plan and supporting rules.

DATES: Written comments must be received on or before June 4, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R10–OAR–2007–0112, by one of the following methods:

A. *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Mail:* Krishna Viswanathan, EPA, Office of Air, Waste, and Toxics (AWT–107), 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101

C. *Hand Delivery:* EPA, Region 10 Mailroom, 9th Floor, 1200 Sixth Avenue, Seattle, Washington 98101. Attention: Krishna Viswanathan, Office of Air Waste, and Toxics (AWT–107). Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R10–OAR–2007–0112. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to the EPA without going through *http://www.regulations.gov,* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy during normal business hours at the Office of Air, Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle, Washington 98101.

FOR FURTHER INFORMATION CONTACT: Krishna Viswanathan, (206) 553–2684, or by e-mail at *R10-Public_Comments@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean the EPA. Information is organized as follows:

Table of Contents

I. Background

Section 110(a)(1) of the CAA requires, in part, that states submit to EPA plans to maintain any NAAQS promulgated by EPA. Areas that were maintenance areas for the 1-hour ozone NAAQS but attainment for the 8-hour ozone NAAQS are required to submit a plan to demonstrate the continued maintenance of the 8-hour ozone NAAQS. EPA established June 15, 2007, three years after the effective date of the initial 8-hour ozone designations, as the deadline for submission of plans for these areas.

On May 20, 2005, EPA issued guidance for States in preparing maintenance plans under section 110(a)(1) of the CAA for areas that are required to do so under 40 CFR 51.905(c) and (d). At a minimum, the maintenance plan should include the following five components:

1. An attainment inventory, which is based on actual typical summer day emissions of volatile organic compounds (VOCs) and oxides of nitrogen (NO_X) from a base year chosen by the State;

2. A maintenance demonstration which shows how the area will remain in compliance with the 8-hour ozone standard for 10 years after the effective date of the designation;

3. A commitment to continue to operate ambient air quality monitors to verify maintenance of the 8-hour ozone standard;

4. A contingency plan that will ensure that any violation of the 8-hour ozone NAAQS will be promptly corrected; and

5. An explanation of how the State will verify continued attainment of the standard under the maintenance plan.

On January 17, 2007, EPA received a request from Ecology to approve under section 110 of the CAA, a SIP revision pertaining to the maintenance plan for the Vancouver portion of the Pdx/Van AQMA. On May 22, 2007, EPA received a request from the Oregon Department of Environmental Quality, to approve a SIP revision pertaining to the maintenance plan for the Portland portion of the Pdx/Van AQMA and the Salem Keizer Area Transportation Study Air Quality Area under section 110 of the CAA. As both these submissions from the States of Washington and Oregon pertain to the Pdx/Van AQMA, EPA is taking action on these submissions concurrently. However this action addresses only the Vancouver portion of the Pdx/Van AQMA.

The EPA has prepared a Technical Support Document (TSD) with more detailed information about the SIP revisions Ecology has submitted for approval. The TSD is available for review as part of the docket for this action.

II. Summary of SIP Revision

Ecology's 8-hour ozone maintenance plan addresses all five components of

the 8-hour ozone maintenance plan as outlined in EPA's May 20, 2005 guidance. Ecology has submitted the 8-hour ozone maintenance plan for Vancouver for approval, as well as implementing regulations that support the maintenance plan, for incorporation into the federally enforceable SIP and EPA proposes to approve these changes to the SIP.

1. Attainment Inventory

An emissions inventory is an itemized list of emission estimates for sources of air pollution in a given area for a specified time period. Ecology provided a comprehensive and current emissions inventory for NO_X and VOCs. Ecology has chosen to use 2002 as the base year from which it will project emissions. The maintenance plan also includes an explanation of the methodology used for determining the anthropogenic (area and mobile sources) emissions. The inventory is based on emissions from a "typical summer day." The term "typical summer day" refers to a typical weekday during the months when ozone concentrations are typically the highest.

2. Maintenance Demonstration

With regard to demonstrating continued maintenance of the 8-hour ozone standard, Ecology projects that the total emissions of ozone precursors from Vancouver will decrease during the 10-year maintenance period. Ecology has projected emissions for 2015, which is more than 10 years from the effective date of initial designations, as suggested in the EPA guidance for section 110(a)(1) maintenance plans. In 2002, the total anthropogenic emissions in Vancouver were 154,692 lbs/day for VOCs and 81,436 lb/day for NO_X. The projected 2015 anthropogenic emissions from Vancouver are expected to be 136,323 lb/day for VOCs and 59,381 lbs/day for NO_X. As such, the plan demonstrates that emissions are projected to decrease. This demonstrates that the net VOC emissions are expected to be about 13% lower, and NO_X emissions about 37% lower in 2015 compared to 2002 levels.

The formation of ozone is dependent on a number of variables which cannot be estimated through emissions growth and reduction calculations. A few of these variables include weather and the transport of ozone precursors from outside the maintenance area. In order to demonstrate continued maintenance of the standards, a State may utilize more sophisticated tools such as air quality modeling to support their analysis; Ecology used air quality modeling to assess the comprehensive impacts of growth through 2015 on ozone levels in the area. Results of modeling conducted by Ecology and submitted to EPA demonstrate that the highest predicted design value for Vancouver is 0.072 parts per million, which is below the 1997 and the 2008 ozone NAAQS, and is therefore in compliance with both the 8-hour ozone NAAQS.

EPA's Evaluation of CAA 110(l) Considerations

The maintenance demonstration discussed in the preceding section also meets the section 110(l) requirements of the CAA which states, "Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter." Ecology has submitted evidence to EPA that the State provided a reasonable notice and public hearing process prior to State adoption and submission of this plan to EPA.

The proposed plan demonstrates maintenance of all applicable ozone NAAQS, namely the 2008 and 1997 8-hour standards. The Vancouver, Washington area is within the compliance levels for the remaining criteria pollutants [1] based on historical monitoring.

Based on the VOC, NO_X, and carbon monoxide emissions information submitted with this plan, EPA concludes that approval of the changes in this proposed plan will not cause an increase of direct or precursor emissions that will interfere with the Portland area's maintenance of any criteria pollutant NAAQS. Therefore, an approval of this plan revision will not interfere with any applicable requirement concerning attainment or maintenance of any NAAQS.

3. Ambient Air Quality Monitoring

With regard to the ambient air monitoring component of the maintenance plan, Ecology commits to continue operating air quality monitoring stations in accordance with 40 CFR part 58 throughout the maintenance period to verify maintenance of the 8-hour ozone standard, and will submit quality-assured ozone data to EPA through the Air Quality System. EPA finds this to satisfy the requirements of CAA section 110(a).

4. Contingency Measures

Section 110(a)(1) of the CAA requires the State to develop a contingency plan that will ensure that any violation of a NAAQS is promptly corrected. The purpose of the contingency measures, such as those included in the State's submitted maintenance plan, is to provide a range of response actions that may be selected for implementation in the event of any violation of the 1997 8-hour ozone NAAQS.

5. Verification of Continued Attainment

Ecology will continue to monitor ambient air quality ozone levels in the Portland-Vancouver AQMA as described in Contingency Plan. Ecology will update countywide emission inventories every three years as required by the Consolidated Emission and Reporting Rule (CERR) to update the National Emissions Inventory. If ambient ozone levels increase, Ecology will compare CERR updates with the 2002 and 2015 emissions inventories and evaluate the assumptions used in the 2015 emissions projections to determine whether emissions are increasing at a rate not anticipated in the maintenance plan.

EPA's Evaluation of Supporting Rules

Ecology submitted several rules that would create control programs to support the emissions reductions and the maintenance demonstration proposed in the submission. Ecology also submitted several sections of the Washington Administrative code (WAC) 173–422 pertaining to the Motor Vehicle Emission Inspection Program for approval by EPA. These proposed changes do not interfere with the maintenance demonstration for this SIP and merely reflect the changes in the program as a result of technology upgrades in automobiles. After a review of these regulatory provisions, EPA proposes to approve the changes to WAC 173–422 and to incorporate them into the federally enforceable SIP.

Additionally, EPA is proposing to approve the new industrial growth allowances that have been used in the maintenance demonstration for this submission and is relying on the current Southwest Clean Air Agency SIP approved rules, 400–030, 400–101, 400–111 and 400–113 (62 FR 27204; Effective 6/18/97) to support this maintenance plan demonstration.

[1] EPA's AirData Database—*http://www.epa.gov/oar/data/reports.html.*

1-Hour NAAQS Obligations That No Longer Apply in This Area

Two additional amendments to Ecology's existing 1-hour maintenance plan have also been submitted for approval pursuant to 40 CFR 51.905(e)(1). In this submission, Ecology has submitted a maintenance SIP for the 8 hour NAAQS for this area that meets the requirements of CAA section 110(l) and section 193 of the CAA. Therefore, EPA proposes to approve these two amendments to the existing 1-hour ozone maintenance plan:

1. Removal of the obligation to submit a maintenance plan for the 1-hour NAAQS eight years after approval of the initial 1-hour maintenance plan; and

2. Removal of the State's obligation to implement contingency measures upon a violation of the 1-hour NAAQS.

Washington's SIP submittal meets the CAA requirements for SIP submittals with respect to these two changes.

III. Proposed Action

EPA is proposing to approve the section 110(a)(1) ozone maintenance plan, including its correlating implementing regulations, for Vancouver, Washington, submitted on January 17, 2007, as revisions to the federally enforceable Washington SIP. EPA is proposing to approve the maintenance plan and supporting rules for the Vancouver portion of the Portland-Vancouver AQMA because they meet the requirements of section 110(a)(1) and section 110(l) of the CAA. EPA is soliciting public comments on this proposed approval. EPA will consider these comments and address them before taking final action.

IV. Washington Notice Provision

Washington's Regulatory Reform Act of 1995, codified at Chapter 43.05 Revised Code of Washington (RCW), precludes "regulatory agencies", as defined in RCW 43.05.010, from assessing civil penalties under certain circumstances. EPA has determined that Chapter 43.05 of the RCW, often referred to as "House Bill 1010," conflicts with the requirements of CAA section 110(a)(2)(A) and (C) and 40 CFR 51.230(b) and (e). Based on this determination, Ecology has determined that Chapter 43.05 RCW does not apply to the requirements of Chapter 173–422 WAC. See 66 FR 35115, 35120 (July 3, 2001). The restriction on the issuance of civil penalties in Chapter 43.05 RCW does not apply to local air pollution control authorities in Washington because local air pollution control authorities are not "regulatory agencies" within the meaning of that statute. See 66 FR 35115, 35120 (July 3, 2001).

In addition, EPA is relying on the State's interpretation of another technical assistance law, RCW 43.21A.085 and .087, to conclude that the law does not impinge on the State's authority to administer Federal Clean Air Act programs. The Washington Attorney Generals' Office has concluded that RCW 43.21A.085 and .087 do not conflict with Federal authorization requirements because these provisions implement a discretionary program. EPA understands from the State's interpretation that technical assistance visits conducted by the State will not be conducted under the authority of RCW 43.21A.085 and .087. See 66 FR 16, 20 (January 2, 2001); 59 FR 42552, 42555 (August 18, 1994).

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: March 3, 2010.

Dennis J. McLerran,

Regional Administrator, Region 10.

[FR Doc. 2010–10644 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2010–0218; FRL–9135–4]

Revisions to the California State Implementation Plan, Placer County Air Pollution Control District, Sacramento Metropolitan Air Quality Management District, San Joaquin Valley Unified Air Pollution Control District, and South Coast Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Placer County Air Pollution Control District (PCAPCD), Sacramento Metropolitan Air Quality Management District (SMAQMD), San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD), and South Coast Air Quality Management District (SCAQMD) portions of the California State Implementation Plan (SIP). These revisions concern volatile organic

compound (VOC) emissions from petroleum facilities, chemical plants, and facilities which use organic solvents. We are proposing to approve local rules to regulate these emission sources under the Clean Air Act as amended in 1990 (CAA or the Act).

DATES: Any comments on this proposal must arrive by June 4, 2010.

ADDRESSES: Submit comments, identified by docket number [EPA–R09–OAR–2010–0218], by one of the following methods:

1. *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions.

2. *E-mail: steckel.andrew@epa.gov.*

3. *Mail or deliver:* Andrew Steckel (Air-4), U.S. Environmental Protection Agency Region IX, 75 Hawthorne Street, San Francisco, CA 94105–3901.

Instructions: All comments will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Information that you consider CBI or otherwise protected should be clearly identified as such and should not be submitted through *http://www.regulations.gov* or e-mail. *http://www.regulations.gov* is an "anonymous access" system, and EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send e-mail directly to EPA, your e-mail address will be automatically captured and included as part of the public comment. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at *http://www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (*e.g.,* copyrighted material), and some may not be publicly available in either location (*e.g.,* CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Nicole Law, EPA Region IX, (415) 947–4126, *law.nicole@epa.gov.*

SUPPLEMENTARY INFORMATION: This proposal addresses the following local rules: PCAPCD Rule 216 Organic Solvent Cleaning and Degreasing Operations, SMAQMD Rule 466 Solvent Cleaning, SJVUAPCD Rule 4661 Organic Solvents, SCAQMD Rule 1173 Control of Volatile Organic Compound Leaks and Releases from Components at Petroleum Facilities and Chemical Plants. In the Rules and Regulations section of this **Federal Register**, we are approving these local rules in a direct final action without prior proposal because we believe these SIP revisions are not controversial. If we receive adverse comments, however, we will publish a timely withdrawal of the direct final rule and address the comments in subsequent action based on this proposed rule. Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

We do not plan to open a second comment period, so anyone interested in commenting should do so at this time. If we do not receive adverse comments, no further activity is planned. For further information, please see the direct final action.

Dated: March 18, 2010.

Jared Blumenfeld,

Regional Administrator, Region IX.

[FR Doc. 2010–10401 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R7–ES–2009–0042; 92210–1117–0000–B4]

RIN 1018–AW56

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Polar Bear in the United States

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period, and announcement of public hearings.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the reopening of the public comment period on the proposed designation of critical habitat for the polar bear (*Ursus maritimus*) under the Endangered Species Act of 1973, as amended (Act). We also announce the availability of a draft economic analysis (DEA), corrections to our proposed boundaries for sea-ice critical habitat, our intention to hold two public hearings to provide the public with an opportunity to submit testimony on the proposed designation of critical habitat for the polar bear and on the DEA, and an amended required determinations section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to provide additional comment on the proposed rule, the associated DEA, corrections to our proposed boundaries for sea-ice critical habitat, and the amended required determinations section. If you submitted comments previously, you do not need to resubmit them because we have already incorporated them into the public record and will fully consider them in preparation of the final rule.

DATES: *Written Comments:* We will consider comments we receive on or before July 6, 2010.

Public Hearings: We will hold two public hearings, one on June 15, 2010, from 7–10 p.m. in Anchorage, Alaska, and another on June 17, 2010, from 7–10 p.m. in Barrow, Alaska. During the first hour of these meetings (from 7–8 p.m.), we will present information on the DEA and proposed critical habitat. Public comments will be taken from 8–10 p.m.

ADDRESSES: *Written Comments:* You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Please follow the instructions for submitting comments on Docket No. FWS–R7–ES–2009–0042.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R7–ES–2009–0042; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

Public Hearings:

- The Barrow, Alaska, public hearing will be held at Iñupiat Heritage Center, 5421 North Star Street, Barrow, Alaska.
- The Anchorage, Alaska, public hearing will be held at Z.J. Loussac Public Library, 3600 Denali Street, Anchorage, Alaska.

For more information on the public hearings, see the Public Hearings section below.

We will post all comments, and transcripts of the public hearings on *http://www.regulations.gov.* This generally means that we will post any personal information you provide to us (*see* the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Thomas Evans, Wildlife Biologist, U.S. Fish and Wildlife Service, Marine Mammals Management Office, 1011 East Tudor Road, Anchorage, AK 99503; by telephone (907–786–3800); or by facsimile (907–786–3816). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We will accept written comments and information during this reopened comment period on the proposed rule to designate critical habitat for the polar bear that we published in the **Federal Register** on October 29, 2009 (74 FR 56058), the DEA of the proposed designation, corrections to our proposed boundaries for sea-ice critical habitat, and the amended required determinations section provided in this document. We will consider information and recommendations from all interested parties. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as critical habitat under section 4 of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), including whether the benefit of designation would outweigh threats to the species caused by that designation, such that the designation of critical habitat is prudent.

(2) Specific information on:

- The amount and distribution of habitat used by polar bear populations in the United States, specifically in the southern Beaufort, Chukchi, and Bering Seas;
- What areas occupied at the time of listing that contain features essential for the conservation of the species we should include in the designation and why; and
- What areas not occupied at the time of listing, within the jurisdiction of the United States, are essential to the conservation of the species and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on features essential to the conservation of the species within proposed critical habitat.

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts. Such impacts could include any potential impacts on oil and gas development and exploration.

(5) Potential effects on oil and gas development and exploration including those related to impacts referenced in (4), and those relating to the opening of oil and gas lease sale areas in the Chukchi and Beaufort Seas.

(6) Potential effects on native cultures and villages.

(7) Potential effects on commercial shipping through the Northern Sea Route in anticipation of a longer navigable season.

(8) Special management considerations or protections that the essential features, as identified in the proposed rule to designate critical habitat (74 FR 56058), may require.

(9) Specific information on the incremental effects of the designation of critical habitat for the polar bear. In particular, will any aspect of the proposed critical habitat designation result in consultations under section 7 of the Act with a different set of protections than those afforded by the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*)?

(10) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

(11) Information on whether the DEA identifies all Federal, State, and local costs and benefits attributable to the proposed designation of critical habitat, and information on any costs that we may have inadvertently overlooked.

(12) Information on whether the DEA makes appropriate assumptions regarding current practices and any regulatory changes that likely may occur if we designate critical habitat.

(13) Information on the accuracy of our methodology in the DEA for distinguishing baseline and incremental costs, and the assumptions underlying the methodology.

(14) Information on whether the DEA correctly assesses the effect on regional costs associated with land use controls that may result from the designation of critical habitat.

(15) Information on the likelihood of adverse social reactions to the designation of critical habitat, as discussed in the DEA, and how the consequences of such reactions, if likely to occur, would relate to the conservation and regulatory benefits of the proposed critical habitat designation.

(16) Information on areas that the members of the public have recommended we exclude from or add to our proposed critical habitat designation. Specifically, we may exercise our discretion to exclude areas from critical habitat designation if we determine that the benefits of excluding an area outweigh the benefits of including it, provided the exclusions will not result in the extinction of the species. In response to our **Federal Register** notice of October 29, 2009, the Service received comments recommending that we exclude certain areas from the critical habitat designation as provided for under the Act. The requested exclusions include the following:

- Coastal villages that are either within or adjacent to proposed critical habitat.
- Alaska Native and privately-owned lands, e.g., Village Corporations, organized municipalities, North Slope Borough land, and Alaska Native allotments.
- Lands under the control of the U.S. Department of Defense, e.g., Long Range Radar Sites and Short Range Radar Sites.
- Current and proposed oil and gas exploration, development, and production sites, including transportation corridors; all active and proposed oil and gas lease sale areas; and proposed sites for mining and shipping operations.
- Areas where polar bears den infrequently, such as barrier islands that do not contain denning habitat; barrier islands in western Alaska; and areas that do not contain the specific habitat characteristics that allow for denning.
- Areas where polar bears occur infrequently, such as the proposed 1.6-kilometer (km) (1-mile) no-disturbance area around the barrier islands; Norton Sound and Norton Bay; the Seward Peninsula; and sea-ice habitat when sea ice concentrations are less than 15 percent.

The Service also received comments recommending that we include additional areas in our proposed critical habitat designation, including:

- The entire coastal plain of the Arctic National Wildlife Refuge.
- Additional sea-ice habitat beyond the 300-meter (984-feet) isobath to encompass the entire 321 km (200 miles) or the Exclusive Economic Zone.
- All lands known to contain terrestrial dens.

All comments we received in response to our October 29, 2009, proposed rule (74 FR 56058) that recommended exclusion or inclusion of lands from the designation of critical habitat are available for public review and comment at the Federal

eRulemaking Portal: *http://www.regulations.gov*. Search under Docket No. FWS–R7–ES–2009–0042.

You may submit your comments and materials concerning the proposed rule, associated DEA, boundary corrections, or amended required determinations by one of the methods listed in the **ADDRESSES** section. If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information that you provide, such as your address, phone number and e-mail address—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov.*

Comments and materials we receive, as well as supporting documentation we used in preparing the proposed rule, this document, and the DEA, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Marine Mammals Management Office (*see* **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the proposed rule and the DEA on the Internet at *http://www.regulations.gov* at Docket No. FWS–R7–ES–2009–0042, or by mail from the Marine Mammals Management Office (*see* **FOR FURTHER INFORMATION CONTACT**).

Public Hearings

Section 4(b)(5)(E) of the Act requires that we hold one public hearing if any person requests it within 45 days of the publication of a proposed rule. In response to requests from the public, the Service will hold two public hearings on our proposed rule to designate critical habitat for the polar bear on the dates and times shown in the **DATES** section and at the locations shown in the **ADDRESSES** section. In addition to having the opportunity to provide oral comments in person, we will provide telephone access for the public hearing held in Barrow, Alaska. Contact the Marine Mammals Management Office (*see* **FOR FURTHER INFORMATION CONTACT**) for more information about obtaining telephone access for the Barrow, Alaska, public hearing.

People wishing to make an oral statement for the record at a public hearing are encouraged to provide a written copy of their statement and present it to us at the hearing. In the event that attendance at the public hearings is large, the time allotted for oral statements may be limited. Oral and written statements receive equal consideration. There are no limits on the length of written comments submitted to us. If you have any questions concerning a public hearing, please contact the Marine Mammals Management Office (*see* **FOR FURTHER INFORMATION CONTACT**).

People needing reasonable accommodations in order to attend and participate in the public hearings should contact the Marine Mammals Management Office (*see* **FOR FURTHER INFORMATION CONTACT**) as soon as possible. In order to allow sufficient time to process requests, please call no later than one week before the hearing date.

Correction to Total Area Proposed for Critical Habitat

The October 29, 2009, proposed rule (74 FR 56058) indicated a total proposed designation of approximately 519,403 square kilometers (km^2) (200,541 square miles (mi^2)). However, we incorrectly identified the extent of U.S. territorial waters in that proposal; thus, we are reducing the area we are proposing as critical habitat for the polar bear to accurately reflect the U.S. boundary for proposed sea-ice habitat. With this change, we are proposing to designate in total approximately 484,764 km^2 (187,166 mi^2) of critical habitat for the polar bear. We have updated our maps to reflect this change; you may view revised maps on our Web site at: *http://alaska.fws.gov/fisheries/mmm/polarbear/criticalhabitat.htm.* You can obtain hard copies of maps by contacting the Marine Mammals Management Office (*see* **FOR FURTHER INFORMATION CONTACT**).

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat for the polar bear. On July 16, 2008, the Center for Biological Diversity, Natural Resources Defense Council, and, Greenpeace, Inc., filed an amended complaint against the Service for, in part, failing to designate critical habitat for the polar bear concurrently with the final listing rule [*Center for Biological Diversity et al.* v. *Kempthorne et al.,* No. 08–2113–D.D.C. (transferred from N.D. Cal.)]. On October 7, 2008, the U.S. District Court for the Northern District of California entered an order approving a stipulated settlement of the parties. The stipulated settlement, in part, required the Service, on or before June 30, 2010, to submit to the **Federal Register** a final critical habitat designation for the polar bear. On March 24, 2010, the court approved a stipulation extending this deadline to November 23, 2010. Comments or information that we receive in response to the proposed rule will allow us to comply with the court order and section 4(b)(2) of the Act. For more information on previous Federal actions concerning the polar bear, refer to the final listing rule and final special rule published in the **Federal Register** on May 15, 2008 (73 FR 28212), and December 16, 2008 (73 FR 76249), respectively.

On October 29, 2009, we published a proposed rule to designate critical habitat for the polar bear (74 FR 56058). With the boundary change described above, we propose to designate approximately 484,764 km^2 (187,166 mi^2) in three units including sea-ice, denning, and barrier island habitat. The proposed rule had an initial 60-day comment period that closed on December 28, 2009.

Section 3 of the Act defines critical habitat as the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features essential to the conservation of the species and that may require special management considerations or protection, and specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. If the proposed rule is made final, section 7 of the Act will prohibit destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency. Federal agencies proposing actions that affect critical habitat must consult with us on the effects of their proposed actions, under section 7(a)(2) of the Act.

Draft Economic Analysis

Section 4(b)(2) of the Act requires that we designate or revise critical habitat based upon the best scientific and commercial data available, after taking into consideration the economic impact, impact on national security, or any other relevant impact of specifying any particular area as critical habitat.

We have prepared a DEA that identifies and analyzes the potential economic impacts associated with the proposed critical habitat designation for the polar bear published in the **Federal Register** on October 29, 2009 (74 FR 56058). The DEA quantifies the potential economic impacts of critical habitat designation for the polar bear. The economic impact of the proposed critical habitat designation is analyzed

by comparing scenarios both "with critical habitat" and "without critical habitat." The "without critical habitat" scenario represents the baseline for the analysis, and qualitatively considers protections already in place for the species (e.g., under the Federal listing and other Federal, State, and local regulations). The baseline, therefore, represents the costs incurred from polar bear conservation efforts expected to occur regardless of whether critical habitat is designated. The "with critical habitat" scenario describes the incremental impacts associated specifically with the designation of critical habitat for the species. The incremental conservation efforts and associated impacts are those not expected to occur absent the designation of critical habitat for the species. In other words, the incremental costs are those attributable solely to the designation of critical habitat above and beyond the baseline costs; these are the costs we may consider in the final designation of critical habitat. The analysis forecasts incremental impacts likely to occur if we finalize the proposed critical habitat designation.

The DEA provides estimated costs of the reasonably foreseeable potential economic impacts of the proposed critical habitat designation for the polar bear through 2039. This time horizon pertains to the forecast of impacts to oil and gas exploration, development, and production, and associated construction projects, as these are the primary activities occurring within the proposed critical habitat area. It identifies potential incremental costs as a result of the proposed critical habitat designation, which are those costs attributed to critical habitat over and above those costs attributed to listing and the protections afforded the polar bear under the MMPA. The DEA quantifies economic impacts of polar bear conservation efforts associated with the following categories of activity: (1) Oil and gas exploration and development; (2) marine and coastal construction activities; (3) commercial shipping and marine transportation; and (4) U.S Air Force and U.S. Coast Guard operations.

Polar bears and their habitat already receive significant regulatory protection under the MMPA and under the Act (due to the listing of the species as threatened). The incidental take regulations (73 FR 33212, 71 FR 43925) address the direct effects of oil and gas projects, and provide protection for habitats that are predictably used, such as denning habitat. Longer term planning actions, such as oil and gas lease sales, are reviewed under the section 7 jeopardy standard of the Act. For example, U.S. Department of the Interior's Bureau of Land Management National Petroleum Reserve-Alaska Integrated Activity plans are reviewed under section 7 of the Act because polar bears are listed as a threatened species. Oil spills are not authorized; however, protections are provided through the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*), which mandates contingency planning and enhanced capabilities for oil spill responses. Additionally, the State of Alaska's Department of Natural Resources Division of Oil and Gas permits, while lacking a federal nexus, adopt and reiterate existing Federal requirements and protections, for example, requiring permittees to document and report sightings of polar bears to the Service, to maintain buffers of 1 mile around known polar bear dens, and to report to the Service within 24 hours any new dens identified. These existing regulatory requirements provide significant protections for polar bears and their habitat, such that we anticipate only minimal additional regulatory involvement under the Act resulting from the designation of critical habitat. Costs associated with the designation of polar bear critical habitat are therefore limited primarily to the administrative costs of considering adverse modification in future section 7 consultations under the Act (that is, in addition to considering jeopardy, which is considered due to the listing of the polar bear). The future (2010–2039) total present value incremental impacts (those estimated to occur because of critical habitat designation) are estimated to be $669,000 (an annualized impact of $53,900) assuming a 7-percent discount rate.

On March 31, 2010, President Obama announced the opening of additional lease sale areas along the Outer Continental Shelf, including areas of the Eastern Gulf of Mexico and the Atlantic Ocean. The announcement did not open additional lease sale areas in the proposed critical habitat area for polar bears or the Arctic Ocean in general. The existing 5-year plans for the Beaufort and Chukchi Seas (2007–2012) both proposed a series of lease sales. The Administration's announcement states that planned lease sales in these areas that have not yet been conducted will be canceled. Exploration may continue on existing leases in the Beaufort and Chukchi Seas, and the results of exploration, along with information from current and planned scientific studies, will help determine the extent to which additional lease sales in these areas are both needed and appropriate in the next 5-year program. (*e.g.,* in the 2012–2017 5-year plan).

This announcement relates to Section 3.4 of the DEA, which describes potential future oil and gas activity in the proposed critical habitat area, 2010 through 2039. Given changes in OCS policy, as described in the President's announcement, the DEA may overstate future oil and gas development activity in areas proposed for critical habitat. However, these changes are unlikely to have an effect on the findings of the DEA. This is because, regardless of scope and scale of future oil and gas development, critical habitat designation will not result in changes to polar bear conservation requirements (*i.e.,* the FWS anticipates that polar bear conservation will continue to be driven by the Marine Mammal Protection Act and the bear's listing status). In addition, the discussion contained in Section 3.2 of the DEA, which addresses the limited direct incremental economic impacts of critical habitat designation and the potential for indirect impacts, remains unchanged.

As stated earlier, we are requesting data and comments from the public on the DEA, as well as all aspects of the proposed rule, our boundary corrections, and our amended required determinations. We may revise the proposed rule or supporting documents to incorporate or address information we receive during the reopened public comment period. In particular, we may exclude an area from critical habitat if we determine that the benefits of excluding the area outweigh the benefits of including the area, provided the exclusions will not result in the extinction of this species.

Required Determinations—Amended

In our October 29, 2009, proposed rule (74 FR 56058), we indicated that we would defer our determination of compliance with several statutes and Executive Orders until the information concerning potential economic impacts of the designation and potential effects on landowners and stakeholders became available in the DEA. We have used the DEA data to make these determinations. In this document, we affirm the information in our proposed rule concerning Executive Order (E.O.) 12866 (Regulatory Planning and Review), E.O. 12630 (Takings), E.O. 13132 (Federalism), E.O. 12988 (Civil Justice Reform), E.O. 13211 (Energy, Supply, Distribution, and Use), the Unfunded Mandates Reform Act, the Paperwork Reduction Act, the National Environmental Policy Act, and the President's memorandum of April 29, 1994, "Government-to-Government

Relations with Native American Tribal Governments" (59 FR 22951). However, based on the DEA data, we revise our required determination concerning the Regulatory Flexibility Act.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions), as described below. However, no regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Based on our DEA of the proposed designation, we provide our analysis for determining whether the proposed rule would result in a significant economic impact on a substantial number of small entities. Based on comments we receive, we may revise this determination as part of our final rulemaking.

According to the Small Business Administration, small entities include small organizations, such as independent nonprofit organizations, and small governmental jurisdictions including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include: Oil and gas extraction and drilling, natural gas distribution, and mining concerns with fewer than 500 employees; oil and gas or mining support activities, water supply and irrigation systems, land subdivision, air traffic control and airport operations, and transportation support activities with annual average revenues of less than $6.5 million; construction-related businesses with less than $31 million in average annual revenues; and pipeline transportation of crude oil businesses with less than 1,500 employees. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation, as well as types of project modifications that may result. In general, the term "significant economic impact" is meant to apply to a typical small business firm's operations.

To determine if the proposed designation of critical habitat for the polar bear would affect a substantial number of small entities, we considered the number of small entities affected within particular types of economic activities, i.e., oil and gas exploration and development, and marine and coastal development activities. Specifically, we identified 131 entities that may be impacted by the designation of critical habitat, and of these, 112 entities meet the small business threshold. These entities include local governments (*e.g.,* the North Slope Borough and the Northwest Arctic Borough), construction companies, specialty trade contractors, airport operations and support contractors, and other support contracting companies. In estimating the numbers of small entities potentially affected, we considered whether the activities of these entities may include any Federal involvement, in particular, activities that may trigger a consultation under section 7 of the Act. Critical habitat designation will not affect activities that do not have any Federal involvement; designation of critical habitat affects activities conducted, funded, or authorized by Federal agencies.

If we finalize the proposed critical habitat designation, Federal agencies must consult with us under section 7 of the Act if their activities may affect designated critical habitat. Consultations to avoid the destruction or adverse modification of critical habitat would be incorporated into the existing consultation process.

As described in Appendix A of the DEA, the potential impacts to small businesses are those associated with administrative costs resulting from the need to conduct consultations under section 7 of the Act. These costs associated with small businesses fall under two primary component activities: (1) Oil and Gas Exploration, Development, and Production, and (2) Construction and Development Activities. As discussed in Appendix A of the DEA, we anticipate both of these primary activities to be minimally impacted by a designation of critical habitat because they are generally covered by existing regional regulations (*e.g.,* the MMPA's incidental take regulations at (73 FR 33212, 71 FR 43925)), or associated with section 7 consultation processes. As a consequence, we anticipate only minimal additional regulatory involvement under the Act resulting from the designation of critical habitat.

In summary, we have considered whether the proposed designation would result in a significant economic impact on a substantial number of small entities. For the above reasons and based on currently available information, we certify that, if promulgated, the designation of critical habitat for the polar bear would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required.

Authors

The primary authors of this notice are the staff members of the Marine Mammals Management Office, Alaska Region, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: March 19, 2010.

Thomas L. Strickland,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2010–10512 Filed 5–4–10; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 253

[Docket No. 0908061221–91225–01]

RIN 0648–AY16

Merchant Marine Act and Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) Provisions; Fishing Vessel, Fishing Facility and Individual Fishing Quota Lending Program Regulations

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: The Fisheries Finance Program (FFP or the Program) provides long-term financing to the commercial fishing and aquaculture industries for fishing vessels, fisheries facilities, aquaculture facilities, and individual fishing quotas (IFQs). The Program became a direct loan program, as a result of legislation in 1996, replacing a guaranteed loan program. The FFP collects loan principal and interest from loan recipients and fees from applicants in order to repay monies borrowed from the U.S. Treasury. It maintains fixed interest rates that are comparable to those of private sector lenders, however the FFP allows borrowers to prepay without penalty, and may carry longer

repayment periods that are more advantageous to borrowers. The FFP does not make loans for new vessel construction or for vessel refurbishments that would increase harvesting capacity. Since the publication of its current regulations on May 1, 1996, the Program's authorizing statutes have been amended several times. However, the current regulations implementing the FFP have not been amended since 1996. Prior to the 2006 amendments to the FFP's statutory authorization, the 1996 rules for the Program were sufficient to implement the statute. The 2006 statutory changes have necessitated the current rules. In this action, NMFS amends our regulations to reflect the statutory changes to the Program, and to provide regulations for two additional lending products.

DATES: NMFS invites the public to comment on this proposed rule. Comments must be submitted in writing on or before June 4, 2010. Comments will be accepted only on Subpart B. Subpart C is unchanged except for numbering, therefore, comments will not be accepted.

ADDRESSES: You may submit comments, identified by 0648–AW05, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov.*
- *Fax:* 301–713–2390 x 187, Attn: Earl Bennett.
- *Mail:* Earl Bennett, Acting Chief, Financial Services Division, NMFS, Attn: F/MB5, 1315 East-West Highway, SSMC3, Silver Spring, MD 20910.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to *earl.bennett@noaa.gov* and by e-mail to *david.rostker@omb.eop.gov* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Earl Bennett, at 301–713–2390 or via e-mail at *earl.bennett@noaa.gov.*

SUPPLEMENTARY INFORMATION: The FFP is the lending unit of NMFS' Financial Services Division. With its main office in Silver Spring, MD, the FFP currently has two distinct lending programs. One extends long-term direct loans to owners of vessels, fishery facilities and aquaculture projects, and the other extends long-term direct loans to fishermen for the acquisition or refinancing of quota shares in the Alaska halibut and sablefish IFQ fishery.

Statutory and Regulatory Background

The FFP's primary statutory authority is found in Title XI of the Merchant Marine Act of 1936, as amended (codified at 46 U.S.C. 53701, *et seq.*). This law authorizes the Secretary of Commerce to guarantee the principal and interest of loans made to citizens of the United States for the construction, reconstruction or reconditioning of fishing vessels. Additional statutory provisions authorize specific loan programs, including the Bering Sea/Aleutian Island Crab (BSAI Crab) IFQ lending program, 16 U.S.C. 1862(j), and the Western Alaska Community Development Quota (CDQ) lending program, 16 U.S.C. 1855(i)(1). The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act, (MSRA), 46 U.S.C. 53706(a)(7), also authorizes the FFP to provide direct loans to entities involved in the commercial fishing and aquaculture industries for activities that assist in the transition to reduced fishing capacity; for technologies or upgrades designed to improve collection and reporting of fishery-dependent data; to reduce bycatch; to improve selectivity or reduce adverse impacts of fishing gear; or to improve safety. The FFP does not lend for projects that increase harvesting capacity.

Initially known as the "Fisheries Obligation Guarantee Program" (FOG), the Program originally provided repayment guarantees for fishery loans made to commercial fishermen. Borrowers executed promissory notes, backed by a U.S. Government guarantee; the Program then sold these guaranteed notes at auction to third party noteholders. Once a note was sold, the borrower was obligated to make payments directly to that third-party noteholder, rather than the government. In the event that a borrower defaulted on a guaranteed note, the noteholder was required to make a payment demand to the Program, which was required to pay the noteholder the outstanding principal and interest balance. The Program could then proceed to foreclose on the collateral pledged for the loan, or collect the loan directly from the defaulting borrower.

On October 11, 1996, the Congress amended the Merchant Marine Act. In section 303 of the Sustainable Fishing Act (SFA), 46 U.S.C. 53701 *et seq.,* the Congress transformed the Program from a loan guaranty program into a direct lending program. In response, FOG changed its name to FFP. These amendments allowed the re-designated FFP to function much like a private sector lender. Under the changes, the FFP borrows funds from the United States Treasury, and then lends these funds to members of the fishing industry. Although the Program maintained (and still maintains) a legacy portfolio of guaranteed loans, the amendments to the SFA allowed the FFP to make new loans directly to qualified borrowers without using private sector intermediaries. This structure for the Program is still in place today. Indeed, the Program's loan portfolio performs well, with very few delinquent loans, and the FFP has been successful in maintaining a negative subsidy under Federal Credit Reform Act. The FFP is also authorized to refinance guaranteed FOG loans and transition them into direct loans, subject to the availability of lending authority. Refinanced FOG loans are subject to current FFP requirements.

However, the FFP has not promulgated new regulations since May 1, 1996, when the current regulations were published. (61 FR 19171). The regulations were not modified after the October 11, 1996, statutory amendments because the Program's regulations worked with the new legislation. This action would modify the existing Program regulations to reflect these statutory changes, and, more importantly, includes proposed regulations for two new lending products, BSAI Crab IFQ and Western Alaska Community Development Quota (CDQ). Subpart C, relating to Interjurisdictional Fisheries, is unchanged by this proposed rule except for its redesignation.

Description of Current Lending Policy

Under present policy, the FFP accepts applications from a wide range of potential borrowers, including individuals, partnerships, corporations and other business entities. Acceptance of loan applications is dependent on the Program having loan authority. The FFP

makes its lending decisions on a case-by-case basis. Like private sector lenders, the FFP considers typical credit factors such as the borrower's demonstrated business ability and fishing industry experience, credit-worthiness, compliance with specific loan program requirements, and available collateral, among others. The FFP declines to make loans to applicants who fail to prove that they are acceptable credit risks, as well as to any applicants that the Program deems ineligible or unqualified. In addition, the Program does not make loans for new vessel construction, or for vessel refurbishments that would materially increase harvesting capacity.

Although 46 U.S.C. 53701 does not bar the FFP from financing new vessel construction or modifications that increase harvesting capacity, the FFP does not lend for these purposes in order to be consistent with the agency's larger responsibilities to maintain sustainable fisheries. Additionally, in the past, the FFP's annual lending authority has contained restrictions that prevented the FFP from making loans that increase harvesting capacity.

Although some loan terms are set by statute (*e.g.,* 46 U.S.C. 53702(b)(2) sets interest rate; section 53709(a)(4) restricts loan principal amounts to not more than 80 percent of the aggregate project cost; and section 53710(a)(3) caps most loan terms at 25 years), the FFP does not maintain fixed, program-wide minimum collateral standards; instead, the FFP adjusts each loan's collateral requirements as necessary. In addition to financing the purchase and acquisition of property in market transactions, the FFP may also liquidate assets (such as permits, quotas, licenses, transferable harvesting or operating rights, vessels, real estate, facilities, etc.) that the Program acquires through foreclosure, arrest, judicial sale, settlement of debts or obligations, debt acceleration, or other collection activities. Similar to other lending institutions, the FFP can provide financing to purchase assets the program liquidates.

All loan applicants must either own or hold a long-term lease on the property that is the subject of the financing. The FFP requires first lien priority on all primary collateral (or adequate substitute collateral), and requires that borrowers obtain written approval for subordinate liens to third parties. By statute, FFP loans are authorized to carry maturities of up to 25 years. However, generally the FFP restricts loan terms to the useful life of the assets being financed. If the property is leased, the lease term must exceed the duration of the loan, allow the FFP to place a lien or mortgage upon the leasehold, and authorize the FFP to transfer the lease to another party in the event of foreclosure.

The FFP reserves the right to require additional lending and security terms and conditions to address specific borrowers and circumstances. The FFP will frequently require loan guarantees or security interests in other collateral to bring credit risk to acceptable levels. Such guarantees or collateral may be required from affiliated businesses, the borrower's principals or majority shareholders, or any other persons or entities with a financial interest in the borrower, or any individuals holding community property rights with the borrower. The FFP requires that borrowers maintain insurance appropriate to the collateral, which may include casualty, personal injury, risk, breach of warranty, business interruption, key man life insurance, title policies, maritime coverage or other forms as the FFP determines necessary. Where appropriate, the FFP must be named as an "additional assured," added to such coverage as a "loss payee," or receive assignment of the policy and insurance proceeds.

Applicants for FFP loans must be U.S. citizens or entities eligible to document a vessel for coastwise trade [1] under 46 U.S.C. 50501. Essentially, this requires business entities to be 75 percent owned by U.S. citizens, with key positions and a majority of the board of directors (in the case of a corporation) being U.S. citizens. Individual applicants must be U.S. citizens, from any of the fifty states, the Commonwealth of Puerto Rico, American Samoa, the Territory of the U.S. Virgin Islands, Guam, the Republic of the Marshall Islands, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, or any other possession, commonwealth or territory of the U.S. All loan applicants are subject to background and credit investigations, which may include reviews for unresolved fishing violations, criminal background checks, delinquent debt investigations, and credit reports.

Applicants, who are advised to apply for a loan through regional offices located in Gloucester, MA, St. Petersburg, FL, and Seattle, WA, must pay the appropriate application fee set out in 46 U.S.C. 53713(b). The application fee is one half of one percent of the loan amount requested. Half of this fee, known as the "filing fee," is nonrefundable when the Program officially accepts the application. The second half of the fee, known as the "commitment fee," is earned and becomes nonrefundable when the Program issues an Approval-in-Principle (AIP) letter. The Program may refund the commitment fee if the FFP declines the application or the applicant withdraws the request prior to the Program issuing an AIP letter.

The AIP letter sets out loan terms and conditions. These terms and conditions are issued at the Program's discretion; an applicant's failure to accept them may result in the termination of the processing of the loan. Moreover, the AIP's terms and conditions are reflected in the Program's closing documents.

Traditional Lending: Vessels, Shoreside Facilities and Aquaculture Projects

Borrowers of FFP loans can use FFP financing to purchase or refurbish an existing fishing vessel, as well as finance the purchase, renovation or construction of a fishing facility (such as a processing plant) or an aquaculture facility. Although the FFP will not finance the construction of new vessels, borrowers may use Program funds to refinance the construction costs of a completed vessel. However, the loan applicants must have already paid or financed such construction costs prior to the submission of their loan application. FFP lending, as required by the MSA, as amended, Public Law 109–470, can also be used "to finance sustainable fisheries efforts, including activities that assist in the transition to reduced fishing capacity, technologies or upgrades to improve collection and reporting of fisheries data, to improve or reduce adverse affects of fishing gear, or to improve safety.

In addition to meeting the FFP's general lending requirements, borrowers must show that their vessels or facilities have all the applicable permits, licenses, quotas, entry rights, or other authorizations necessary to harvest or operate their vessels or facilities in accordance with the appropriate fisheries management plan (FMP), implementing regulations and all other applicable Federal, state and local laws.

Current IFQ Lending: Halibut and Sablefish

The 1996 SFA amendments also authorized the creation of IFQ lending programs, identifying two categories of eligible borrowers. Under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), section 303(d)(4), now codified as 16 U.S.C. 1853a(g), the FFP provided IFQ financing for (1) the acquisition of

[1] Ownership requirements for documenting a vessel for use in the coastwise trade and receiving a fisheries endorsement are identical.

IFQ by fishermen who fish from "small vessels," and (2) the first time purchase of IFQ by "entry level fishermen." IFQ financing is fishery specific, and individual Fishery Management Councils (FMCs) must request such financing, and may specify borrower eligibility criteria (such as definitions for "small vessels" and "entry level fishermen"). Under the legislation, the FFP cannot initiate or implement an IFQ lending program until the appropriate FMC submits a request and provides guidance for the requisite criteria. Although the Program suggests that these criteria be included as a part of a fishery management plan (FMP), the FFP will accept formal FMC action and transmittal of the criteria to develop and create a lending program.

The two categories of potential borrowers for the quota share loan program are fishermen who fish from small vessels, and entry level fishermen in the North Pacific Halibut and Sablefish fisheries. Under the MSA, as amended, "Fishermen who fish from small vessels" are defined as those fishermen wishing to purchase IFQ for use on category B, C or D vessels (as defined by 50 CFR 679.40), "whose aggregate ownership of individual fishing quotas will not exceed the equivalent of a total of 50,000 pounds of halibut and sablefish harvested in the fishing year in which a [loan] application is made if the [loan] is approved, who will participate aboard the fishing vessel in the harvest of fish caught under such quotas, who have at least 150 days of experience working as part of the harvest crew in any United States commercial fishery, and who do not own in whole or in part any Category A or Category B vessel." "Entry level fishermen" are similarly defined, but under the statute this group need not have demonstrated fishery experience, and do not need to own halibut and sablefish quota shares before receiving a Program loan. Entry level fishermen may finance an initial quota share purchase that is equivalent to not more than 8,000 pounds of IFQ, as calculated in the year they apply.

Under the present regulations, FFP loans for the HSQS program are awarded on the basis of the FFP's general lending requirements. In addition, the FFP requires that preferred ship mortgages be placed on all Federally documented vessels owned by IFQ borrowers. For borrowers refinancing existing debt, the FFP will not close loans that exceed the outstanding amount of debt being refinanced, in order to prevent Program funds from being used for ineligible purposes. Refinancing is also subject to a cap of 80 percent of the principal of the loan; however, if the current market value of the quota shares exceeds the loan amount by 20 percent or more, a borrower can refinance without providing additional down payment. If the applicant has insufficient equity in the collateral, the applicant is required to pay the debt down to the acceptable 80 percent level.

The Program requires that each applicant for sablefish or halibut IFQ demonstrate how it meets or will meet the relevant statutory conditions at the time of application. To calculate pound limits, the FFP applies the IFQ limits for the year in which the borrower submits the application. This allows the FFP to use the most recent IFQ pound limit when determining loan eligibility. HSQS loans contain covenants requiring that the Program's borrowers be aboard their vessels as the IFQ from their NMFS financed quota shares are fished. However, the Program does not read the statutory text as creating a permanent onboard participation requirement. Instead, the condition is included among a series of eligibility conditions for originating a loan, and the FFP has interpreted it to require that a borrower (1) express the intent to participate aboard when he or she applies for a HSQS loan and; (2) actually be aboard the vessel while the IFQ from each NMFS financed quota share is harvested over the course of a fishing season.

Accordingly, a borrower under the HSQS could meet the statutory onboard participation requirement during the first season of fishing after purchasing quota share with loan proceeds. However, in keeping with the North Pacific Fishery Management Council's (NP Council) expressed policy to maintain the small boat halibut and sablefish fisheries as "owner operated" fisheries, HSQS loan documents contain additional covenants requiring that the Program's borrowers declare annually, under penalty of perjury, that they were aboard the vessel as fish were harvested under the IFQ derived from their NMFS financed quota shares. The FFP may waive the onboard participation loan covenants at the request of the borrower, (*e.g.* to accommodate medical IFQ transfers), provided that the borrower can obtain permission from the Restricted Access Management (RAM) Division of NMFS Alaska Regional office or appropriate office. The Program defers to RAM, or to the office that undertakes the duties of this division to issue or manage quota shares and the NMFS Alaska Regional office, in determining who is eligible to fish under the HSQS. The FFP will not make an HSQS loan to anyone who lacks RAM certification of eligibility for the halibut or sablefish fisheries.

Between FY98 and FY08, the FFP approved 240 applications for halibut and sablefish IFQ loans. The average amount of these loans amounted to $154,209.

Proposed Provisions: CDQ Lending Program

In 1992, the NP Council established a Community Development Quota (CDQ) Program. The intent of this program is to promote fisheries-related economic development in disadvantaged Western Alaska communities. *See* Guard and Maritime Transportation Act of 2006, Public Law 109–241, section 416(a). The remote and isolated nature of Western Alaska limits employment opportunities of most residents to jobs within their communities, and these areas suffer from high unemployment and poverty levels. The CDQ Program was created to provide long-term loans to assist these communities in developing the harvesting and processing capability in local Bering Sea and Aleutian Island fisheries. Although statutory authority for the CDQ Program dates back to 1998, funding for the program was not made available until 2006, Public Law 109–241, section 416(a). Through these regulations, the FFP intends to implement this program.

Unlike the FFP's other lending programs, the CDQ Program would allow the FFP to award loans with maturities of up to thirty (30) years, although the Program has the discretion to use shorter periods. Aside from extended maturities, CDQ loans are subject to the Program's general lending standards and practices; collateral, guarantee and other loan requirements may be adjusted to account for individual credit risks. Entities eligible to participate are set forth in 16 U.S.C. 1855(i), and include:

(1) The villages of Akutan, Atka, False Pass, Nelson Lagoon, Nikolski, and Saint George through the Aleutian Pribilof Island Community Development Association.

(2) The villages of Aleknagik, Clark's Point, Dillingham, Egegik, Ekuk, Ekwok, King Salmon/Savonoski, Levelock, Manokotak, Naknek, Pilot Point, Port Heiden, Portage Creek, South Naknek, Togiak, Twin Hills, and Ugashik through the Bristol Bay Economic Development Corporation.

(3) The village of Saint Paul through the Central Bering Sea Fishermen's Association.

(4) The villages of Chefornak, Chevak, Eek, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kwigillingok, Mekoryuk, Napakiak, Napaskiak,

Newtok, Nightmute, Oscarville, Platinum, Quinhagak, Scammon Bay, Toksook Bay, Tuntutuliak, and Tununak through the Coastal Villages Region Fund.

(5) The villages of Brevig Mission, Diomede, Elim, Gambell, Golovin, Koyuk, Nome, Saint Michael, Savoonga, Shaktoolik, Stebbins, Teller, Unalakleet, Wales, and White Mountain through the Norton Sound Economic Development Corporation.

(6) The villages of Alakanuk, Emmonak, Grayling, Kotlik, Mountain Village, and Nunam Iqua through the Yukon Delta Fisheries Development Association.

(7) Any new groups established by applicable law.

Proposed Crab IFQ Lending Program

In addition to proposing regulatory language for the CDQ Program, this rule would implement the Bering Sea/Aleutian Island (BSAI) crab IFQ quota lending program. FFP lending for Bering Sea/Aleutian Island (BSAI) crab IFQ quota shares, which is an integral part of the crab rationalization program developed by NP Council, will be limited to specific crab fisheries and those persons identified as "captain" or "crew" on a BSAI crab fishing vessel. Additionally, like other FFP loans, crab quota share loan amounts will be limited to 80 percent of the actual purchase price, and carry a 25-year maturity. Captains and crew must be deemed eligible by a RAM or appropriate authority to own Crab QS, and meet all other applicable provisions of the Bering Sea and Aleutian Islands King and Tanner Crab Fishery Management Plan (Crab FMP) and its implementing regulations in effect at the time of their loan closing. The Program will rely on RAM to determine that the applicant meets the requirements to own crab quota shares.

All requirements and standards for halibut and sablefish IFQ and general FFP lending guidelines will apply to crab IFQ lending, except that the ownership limits after closing an FFP financing are based on a percentage of the total allowable catch not on pounds caught. Like halibut sablefish quota share, borrowers refinancing existing debt cannot borrow more than the outstanding debt and must meet the 80 percent maximum loan amount.

Summary and Explanation of Proposed Regulatory Changes

In addition to redesigning the current regulations, this proposed action makes the following changes, as explained here.

General Definitions (§ 253.10)

This action changes the general definitions section of part 253 to reflect changes in statutory codification and other minor details. Specifically, this action eliminates the word "guarantor" from the definitions of "Guaranteed Note" and "U.S. Note" to clarify that the United States is no longer providing loan guarantees through the FFP. In all other respects the substantive definitions of those two terms remain the same. Similarly, the terms "Applicant," "Application," "Application fee," "Demand," "Fish," "Guarantee," "Security documents," are changed to reflect the Program's current status as a direct lender possessing a legacy portfolio of loan guarantees. The definitions of the terms, "Facility," "Guarantee fee," "Noteholder," "Refinancing," "Refinancing/assumption fee," "U.S.," "Useful life," and "Vessel" remain unchanged from the current regulation.

Additionally, the definitions for the following terms were changed to reflect the recent recodification of the Shipping Statutes. The definition of "Act" was changed from Title XI of the Merchant Marine Act, 1936, as amended to Chapter 537 of title 46 of the U.S. Code, (46 U.S.C. 53701–35), as may be amended from time to time. The definition of "Actual cost" was changed from a calculation to a broader definition that refers to § 253.16 of the rule for specific calculations. The definition of "Aquaculture facility" was changed to delete from its definition the need for its operation to involve commercial purposes. The definition of "CCF" was expanded to include a citation and the purpose of a CCF account. The definition of "Citizen" was changed to update the citation for citizenship qualification. The term "Contributory project" has been deleted, and its provisions are contained in the revised definition of "Project." The terms "Property" and "Project Property" have been deleted as superfluous. The definition of "Program" reflects the change in the name of the Program, from "Fisheries Obligation Guarantee Program" to "Fisheries Finance Program" and provides additional detail on where the Program is located. A definition for the term "RAM" is added to identify the NMFS Alaska Region's Restricted Access Management division or other appropriate authority.

The following terms are new or carry expanded definitions: "Approval in principle letter" is added to describe the document by which the Program advises an applicant that its loan application has been approved. "Captain" is added to provide clarity to a type of borrower authorized to be a crab IFQ applicant. "Charter fishing" replaces the term "Passenger fishing" for consistency with the MSA. "Crewman" is added to describe an individual qualified to apply for IFQ financing. "Fisheries harvest authorization" is defined to provide clarity for its use with the IFQ loan programs. "Fishery facility" is changed to clarify that facilities servicing water craft used for charter fishing are included within this definition. "Fishing" is expanded to match the MSA, as amended definition, thereby providing additional clarity and specifically excluding scientific research activity. "IFQ" is added to reflect its use in the halibut/sablefish and crab IFQ loan programs. "Obligor," which corresponds to the previous term "Notemaker" used in the existing regulations, is added to match the term used in the Act. "Origination year" is added to define how the term will be applied to qualify applicants for IFQ financing. The definition of "Project" has been expanded to improve readability and interpretation of the proposed regulation. The terms "Underutilized fishery" and "Wise use" are changed to bring them in line with current NMFS standards.

Except for renumbering and reordering, the contents of new §§ 253.11, 253.12 and 253.13 (relating to General FFP Credit Standards and Requirements, Credit Application Requirements, and the Initial Investigation and Approval) remain largely unchanged from § 253.11 and §§ 253.13–16 in the current regulations. The sections track the discussion of the Program's lending policies described above.

Loan Documents (§ 253.14)

This action also adds a new § 253.14, the provisions of which largely reflect those of the current § 253.12. Section 253.14 eliminates the distinction in the rule between a "guaranteed note," which was defined by the 1996 regulations as a note sold to a third party and a "U.S. Note," defined as a document presented to the FFP in order to allow the FFP to properly file various liens and security interests. Since the statute was amended in October 1996 to create the direct loan program, these terms are no longer distinct, and this change is necessary to codify the statutory determination that the FFP is issued only a single note, while the debt is held by the United States.

For Program loans originating before October 11, 1996, the term "U.S. Note" applies to the additional note executed by the borrower. However, for loans

originating after October 11, 1996, "U.S. Note" refers to the promissory note given to the FFP that evidences the borrower's actual indebtedness to the U.S. Keeping with current practice, U.S. Notes are assignable, allowing the FFP to sell notes to a third party. This provides the Program an additional opportunity to liquidate a defaulted debt.

This rule also clarifies that, during the life of a loan, the FFP may advance sums to protect its collateral or security interests. For example, the FFP may elect to pay for insurance premiums on collateral property when the borrower has failed to do so. This section establishes that any sums advanced by the FFP will be added to the outstanding loan principal, and incur interest as described by the terms of such additional lending.

In addition to describing the U.S. Note, § 253.14 sets forth certain requirements for the Program's security documents. While the Program may entertain suggested amendments from borrowers and their legal counsel, the FFP retains final authority over the contents of the security documents. Under its lending policy, the FFP finances specific projects, taking the actual property associated with such projects as collateral for the loan. However, to meet its credit risk standards, the Program frequently seeks security interests in assets beyond the property that is the nominal subject of the financing. The FFP may require security interests in other assets owned by the applicant, affiliated businesses, and the applicant's owners. In unusual circumstances, the Program may consider other substitute collateral of equal or greater value. The Program will make this determination on a case-by-case basis.

Recourse Against Other Parties (§ 253.15)

This proposed action also creates § 253.14, which provides that any personal or business guarantees and additional security required by the Program may be secured or unsecured, and may take the form of a repayment guaranty or an irrevocable letter of credit. As a general policy, the FFP will hold those who stand to receive the primary benefit of the project financially accountable for the project's performance. For instance, the FFP may require recourse against a borrower's major shareholders, parent corporation, affiliated businesses, general partners, limited partners, the spouses of borrowers who reside in community property states, and any other person or entity with a financial interest in the borrower. In the event that additional security is unavailable, the value of assets pledged to the U.S. must be deemed sufficient to liquidate the loan.

Actual Cost (§ 253.16)

This action adds a new section § 253.16, to provide detail and clarity for the term "Actual cost." Lending for shoreside facilities, aquaculture facilities and IFQ each require different calculations of actual cost of the project to be financed. As it applies to a vessel, this provision would allow actual cost to be calculated on a "cost basis," meaning that the original cost of a vessel and its capital improvements are depreciated over their useful life. This change is necessary to allow the FFP to account for value added of the depreciated actual cost, which is the basis of the maximum loan amount by limited access permits or other harvest privileges that are appurtenant to the vessel such as, for example, those that are assigned to a vessel, tracked by vessel, or accrue because of vessel ownership. Section 253.106 will provide that the actual cost of a vessel can reflect the value of an appurtenant harvest privilege, even though there may be no cost basis for the appurtenant privilege. The provision clarifies that such harvest privileges may only be included if they are used aboard or by the vessel that is the subject of the loan and that the privileges, themselves, also serve as additional primary collateral for the loan. All other aspects of vessel actual cost are unchanged from the existing rule.

This provision clarifies that the FFP will use two different actual cost computations to determine the cost basis for loans under the Program. For real property owned in fee simple by the borrower, the FFP will value the land according to its current market value. Valuing land on a cost basis is difficult because land does not incur ongoing acquisition costs. Moreover, the value of real property can fluctuate over time, and cost basis may not reflect the change in value, if any. For example, a land owner, who purchased land 20 years ago, may be unable to borrow against the land's current market value if actual cost was measured using cost basis. Using current market value allows older facilities to obtain a loan that is reasonably proportionate to the facility's contemporary value.

In contrast, the FFP will calculate the actual cost for improvements to real property on a cost basis. Cost basis takes the original cost of assets, and depreciates them over their estimated useful life, to determine the present value of the assets. The values of improvements to shoreside and aquaculture facilities are best determined by their cost and their expected lifetime. Equipment and fixtures are often unique to these facilities and are not usable elsewhere, so, alternative methods of evaluation are not readily available.

The FFP will also use cost basis to determine the actual cost of a real property lease. Although a lease is a capital asset, it is of finite duration and requires that the tenant continually pay rent. A lease's actual cost is defined as the net present value of the future stream of rent payments, with the present value calculated at the time the borrower submits its loan application. The FFP will use the United States Department of Treasury Daily Treasury Yield Curve Rate to determine the discount rate. To include a lease among collateral, the project property must be located on the leased land and the duration of the lease must exceed both the nominal term of the financing and any additional period that the FFP deems appropriate.

The FFP will also finance and refinance transferable limited entry privileges. Often these privileges are bought and sold in arm's length transactions, such that an identifiable market already exists for them. The FFP will define the actual cost of transferable limited access privileges in two ways, based on their market value. When first purchased, these rules define actual cost as current market value, as set by purchase price. As with the sale of any good, the value that a buyer and seller agree to is generally the best determination of market value.

In the context of refinancing limited entry privileges, these rules define actual cost as the current market value of similar privileges. Although the value of these privileges may change over time, the existence of an identifiable market allows the FFP to use contemporaneous comparable sales to determine current market value. Additionally, new §§ 253.28(d)(2) and 253.30(c)(2) limit the aggregate value of a borrower's refinancing transactions. The value of a refinancing loan can not exceed the amount required to fully repay the QS debt being refinanced.

Insurance (§ 253.17)

Section 253.17 replaces the old § 253.15(c), and sets out new provisions for the FFP's review and approval of insurance coverage. Currently, the FFP requires each borrower to have and maintain adequate insurance coverage. Typically, the FFP requires borrowers to have general business coverage, including (but not limited to) worker's

compensation, seaman's liability, business interruption, inventory coverage, cargo coverage, breach of warranty, as well as other insurance specific to a loan's collateral package. At a minimum, the current rules provide that the United States must be named as the loss payee, where applicable, and coverage must provide protection from any partial or total loss of collateral.

Additionally, the current rules require that the Program be named an additional assured or co-policyholder, rather than just as a loss payee. The FFP also requires that vessel coverage policies attest to the vessel's seaworthiness. In order to provide coverage in the event a policy term or condition is violated, current FFP rules require that borrowers provide additional coverage to protect against breaches of warranty. Although the Program requires certain provisions and covenants within all policies, the FFP retains broad discretion to tailor its insurance requirements to fit the circumstances of each individual loan.

Under the proposed action, the FFP will be required to find both the insurer and the amount of coverage to be acceptable. The Program will use various insurance rating services to evaluate insurers, and reserves the right to refuse coverage from unapproved insurers. All required insurance coverage must be maintained continuously during the life of the loan. A break in coverage is a security default and grounds for foreclosure. While the FFP recognizes that insurers often maintain the right to cancel insurance coverage for a variety of reasons, the new Program rules require that insurance policies provide for a minimum of 20 days advance written notice to the FFP and the insured of cancellation for vessels, and 30 days of advance written notice for facilities.

Closing (§ 253.18)

The proposed rule redesignates current section § 253.15(g) as § 253.18. As in the existing section, the new section clarifies that the Program approves loans by sending an applicant an AIP, which contains the terms and conditions required to close the loan and disburse the proceeds. The AIP must be signed and returned by the borrower to show acceptance of the terms and conditions; most of these terms and conditions are also incorporated into the actual closing documents. Significant changes to the closing documents, which are standard forms developed by the Program, require the Program's written approval. The FFP may require the borrower's attorney, at the borrower's expense, to draft closing documents for transactions involving state or local law. Likewise, other closing costs, including title search and insurance, escrow fees and document preparation shall be at the borrower's expense.

Finally, the regulations provide that neither the United States nor the FFP will be liable for any adverse consequences related to the timing of closing. The Program will only close loans when all requirements are satisfactorily completed. This section encourages the parties to a loan transaction to work closely with the Program to assure closing on a timely basis.

Dual-use CCF (§ 253.19)

The Capital Construction Program allows fishermen to deposit profits in a capital construction fund (CCF) earmarked account and defer the taxes associated with such profits. This section provides that CCF accounts can be considered as an asset, and may be pledged as collateral for Program financings. This section is unchanged, except for renumbering, from § 253.12(c) of the current regulations, to § 253.19.

Fees (§ 253.20)

This rule would redesignate § 253.16 of the current rule to § 253.20. Aside from acknowledging the application fees set out in § 253.12(b) of the proposed rule, the new § 253.20 relating to guarantee fees and refinancing or assumption fees of the rule will largely remain unchanged from the existing § 253.16.

Under the guaranteed loan program, the Program will still require that each borrower pay a fee of one percent per year on the average unpaid principal balance. This fee is not applicable to direct loans. Although the Program does not originate any new guaranteed loans, the FFP continues to maintain some legacy of FOG loans. For such guaranteed loans, this section indicates that the first year's guarantee fee was due when the loan closed. However, this new section requires that each subsequent year's fee on current guaranteed loans is due in advance of each year, and is based on the scheduled repayments for the coming year. Subsequent year annual fees will continue to be collected until the guaranteed loan is paid in full. Once paid, guarantee fees are not refundable; accordingly, paying off a guarantee loan during the fee year will not result in a credit or refund.

The refinancing and assumption fees addressed in this section apply only when borrowers refinance or assume loans already in the Program's portfolio. It does not apply when the FFP refinances loans held by other lenders. Instead, a standard application fee is due upon submission of the application for refinancing such "outside" financing. Internal refinancing or assumption fees are not refundable, though the FFP may choose to waive such fees if the primary purpose of the refinancing is to protect the interest of the United States.

All fees mentioned in this section are sent to the FFP's lock box address. The mailing address for the lock box is currently: U.S. Department of Commerce, NOAA, P.O. Box 979008, St. Louis, MO 63197–9008.

The FFP requires that the borrower include the loan number on such payments.

Demand by Guaranteed Noteholder and Payment (§ 253.21)

As mentioned above, the Program has retained, and will continue to do so, a portfolio of guaranteed loans. The holders of these debts possess a repayment guarantee. In the event of payment default, the holder of the note makes a "demand" for payment to the U.S. This new section, drawn from previous § 253.17 of the regulations, prescribes that such demand must be made in writing and include a complete payment history for the loan on which demand is made.

Program Operating Guidelines (§ 253.22)

This new section will authorize the FFP to issue non-regulatory policy and administrative guidelines, as needed. In the evolving arena of fisheries and fisheries management, the Program may have to adjust its operations to stay current and effectively administer the Program.

Default and Liquidation (§ 253.23)

Under 46 U.S.C. 53722, there are a wide variety of actions available to the Program if a loan defaults. Program officials will work with its attorneys and the U.S. Department of Justice, as appropriate, to determine a course of action. This new section reaffirms the Program's broad authority to use any means available to the Federal Government to recover debt owed to the United States.

Enforcement Violations and Adverse Actions (§ 253.24)

The FFP believes that it is inconsistent with wise and good use of the Program funds, and contrary to the public interest, to provide financing to parties with unresolved fisheries enforcement violations. Thus, under this new provision, Program borrowers

could face a security default and foreclosure if they incur a fisheries violation. This action provides that the Program may delay the approval, closing or disbursement of loans to parties who have an outstanding Notice of Violation and Assessment issued to them by NMFS enforcement or other authorities. The Program will suspend, cancel or rescind the processing of any application or disbursement if it discovers an unresolved final and unappealable sanction.

In addition, this section provides that the FFP will not approve, close or disburse a loan unless such fine or penalty has (1) been fully resolved; or (2) the parties have entered into an agreement to pay the penalty in installments, and all payments due under such installment agreement are current. Any failure to resolve such penalties could result in disqualification. This policy was originally announced in a notice published in the **Federal Register** on January 4, 1984 (49 FR 491).

Other Administrative Requirements (§ 253.25)

This action reaffirms that borrowers must comply with all applicable Federal statutory and administrative requirements. Some of these provisions include compliance with the Debt Collection Act, providing various certifications under 15 CFR part 26 (Nonprocurement Debarment and Suspension, Anti-Lobbying, Drug free work place, etc.), and the Paperwork Reduction Act (PRA). This section also clarifies that all loan applications are subject to investigation by the United States, and may involve the Department of Commerce's Inspector General, the U.S. Department of Justice, and NMFS Enforcement.

Traditional Loans (§ 253.26)

For clarity, the proposed rule compiles existing policies and requirements for vessel and facility lending into this new section. This section establishes an 80 percent actual cost financing limit, and retains the current maximum loan term of 25 years or the useful life of the assets being financed, whichever is shorter. Consistent with the existing § 253.11 provisions, § 253.26 provides that the FFP will not grant financing for new vessel construction or for projects that materially increase harvesting capacity. This action retains existing provisions found at § 253.11, which allow the FFP to finance or refinance eligible projects, including refinancing the Program's legacy Fisheries Obligation Guarantee loans as direct loans. The FFP would be allowed to reimburse borrowers who have already paid or financed the cost of refurbishing or constructing vessels. In addition to being found credit-worthy, applicants for such reimbursements must have the required fishing permits and authorities. The FFP is required to verify that vessels have the proper permits, licenses, quotas, entry rights, etc. required to legally harvest fish under the appropriate fisheries management plan and all applicable regulations and law.

The proposed rule also adds text, in compliance with 46 U.S.C. 53706(a)(3), that authorizes the FFP to liquidate and finance the purchase of collateral that the Program acquires, including those acquired by accelerating, paying or settling debts or obligations, through foreclosure, or at judicial sale. Financing these assets requires the availability and use of loan authority. This section also includes provisions reflecting changes brought on by the recent changes to the MSA, as amended, including lending for fisheries modernization and to support sustainable fisheries efforts.

IFQ Financing (§ 253.27)

This new section contains the Program's general policy and requirements for establishing IFQ lending programs, as authorized by the MSA, as amended. The FFP must have a request from an FMC to approve and implement an IFQ loan Program. Requests from an FMC should include their suggested definitions of:

Small vessel;
Entry-level fishermen; and
Fishermen who fish from a small vessel.

Council requests under this provision may include any other suggested terms or conditions. However, the FFP can only incorporate those suggestions that the Program determines to be feasible, are not excessively burdensome, and are not otherwise prohibited by applicable law, including FFP rules or operating guidelines.

Although the Program regards the harvest privilege as the primary collateral in an IFQ loan, it will take additional security pledges, as necessary, to maintain the priority of the FFP's interest in the IFQ and to reduce credit risk, in order to protect the interest of the U.S. The FFP prefers quarterly payments of principal and interest to both reduce the number of transactions processed by the agency's accounting office and enhance tracking of loan performance. Pursuant to 46 U.S.C. 53710(a)(3), maximum maturity for an IFQ loan is 25 years.

Halibut Sablefish IFQ Loans (§ 253.28)

This section codifies existing FFP HSQS lending policies and guidance from the Halibut and Sablefish Fisheries Quota-Share Loan Program (63 FR 28986, May 27, 1998).

In addition to the pound limits, onboard requirements, and other eligibility limitations, all HSQS loans would be subject to the Program's general standards and requirements. Collateral, guarantee and other requirements may be adjusted to match each individual credit risk. As with IFQ financing generally, under this new provision the FFP may refinance existing debt associated with HSQS. However, the FFP has determined that providing a HSQS borrower with funds in excess of the borrower's existing and outstanding debt is inconsistent with sound fiscal management. Therefore, HSQS borrowers seeking to refinance debt are subject to the FFP's 20 percent borrower's equity minimum.

Under this rule, the FFP will defer to the RAM division to determine a borrower's eligibility to hold HSQS. To purchase and retain HSQS, the potential owner must apply to RAM, meet the applicable requirements, and receive certification from RAM that they are eligible to hold HSQS. This section requires that an applicant for financing under the HSQS loan program possess or be able to obtain such certificate. Failure to obtain such certification in a timely manner may cause the applicant to lose its application processing priority.

CDQ Loans (§ 253.29)

This proposed rule would add a section establishing the CDQ lending program. Established by statute in 1998, this lending program allows CDQ Groups to finance certain fisheries related projects in Bering Sea and Aleutian Islands. CDQ loans are subject to all general FFP standards and requirements; collateral, guarantee and other requirements may be adjusted in accordance to each project's individual credit risk. However, CDQ loans may carry maturity terms of 30 years, 5 years longer than typical Program lending. This section is necessary because, although the CDQ program was authorized in 1998, there were no appropriations until 2006 to implement the program. The FFP is poised to move forward with the program and needs the implementing regulations to proceed.

Crab IFQ Loans (§ 253.30)

This new section provides regulatory provisions specific to the crab IFQ loan program. Although crab IFQ loans will

be very similar to HSQS loans, the NP Council has limited participant eligibility to crab captains or crewmen on BSAI crab fishing vessels. This section contains additional terms that codify the NP Council's intent. It provides that captains and crew must be certified by RAM as eligible to hold crab quota share, and meet all other applicable provisions of the Crab FMP in effect at the time of their loan closing. Like other FFP loan requirements, the section limits loan amounts to 80 percent of the purchase price, as required by statute.

This section also limits refinancing to persons whose initial purchase of Crab QS would, in accordance with the program's statutory authority, have been eligible for FFP financing. Like HSQS loans, the Program will only finance up to 80 percent of the quota share's current value, and it will limit the amount refinanced to the amount required to fully repay the outstanding debt being refinanced. In addition to requiring that such persons meet all other Program lending and Crab FMP requirements in effect at the time of the refinancing, the applicant must have established equity in the collateral used to support the loan. If they fail to have the requisite equity margin (measured as the difference between the value of the primary collateral and the amount of the loan), applicants seeking refinancing will be required to pay the debt down to the acceptable 80 percent level.

In order to increase the safety and practicality of the lending program, the NP Council recommended that "small vessels" be defined as all vessels in the BSAI crab fisheries. They also expanded the qualifications for RAM determinations of eligibility to include applicants who have made at least one delivery in a fishery subject to the crab rationalization program in two of the three years prior to the application for the crab quota share loan. Unlike with HSQS, for which participation in the loan program is restricted by an IFQ pound limit, the NP Council recommended that ownership limitations in the Crab IFQ lending program be based on a percentage of the initial quota share pool for each crab fishery. This section includes each of these modifications.

Classification

This proposed rule is published under the authority of, and is consistent with, Chapter 537 of the Shipping Act and the MSA, as amended. The NMFS Assistant Administrator has determined that this proposed rule is consistent with the MSA, as amended, and other applicable law, subject to further consideration after public comment.

Executive Order 12866

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

This rule does not duplicate, overlap, or conflict with any other relevant Federal rules.

Paperwork Reduction Act

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

This proposed rule contains collections-of-information subject to the PRA, which have been approved by OMB under control number. The application requirements contained in these rules have been approved under OMB control number 0648–0012. The applications for the halibut/sablefish quota share crew member eligibility certificate have been approved under OMB control number 0648–0272. Public reporting burden for placing an application for FFP financing is estimated to average eight hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding this burden estimate, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (*see* **ADDRESSES**) and by e-mail to *david.rostker@omb.eop.gov* or fax to (202) 395–7285.

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities.

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.,* requires that, "[w]henever an agency is required by section 553 of this title [5 USCS § 553], or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities." 5 U.S.C. 603(a). However, where an agency can certify "that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities" then an agency need not undertake a full regulatory flexibility analysis. 5 U.S.C. 605(b).

The proposed rule replaces the current FFP rule, subpart B of 50 CFR 253, as published in the **Federal Register** on May 1, 1996 (61 FR 19172). The objective of this rule is to update the FFP rule to reflect statutory changes and codify all the existing FFP authorities into 50 CFR part 253 in the Code of Federal Regulations. As codified in this rule, the FFP will offer small businesses in Alaska and native Alaskan communities a source of long-term capital for various segments of the commercial fishing and aquaculture industries. Participation in the FFP is entirely voluntary. This rule imposes no mandatory requirements on any business. These changes are required by recent amendments to the Program's authorizing statutes. Additionally, promulgation of new regulations is necessary to implement the FFP's new lending programs. To gain key efficiencies, this proposed rule combines these Program operating requirements into a single rulemaking. Having all aspects of the FFP's rules located in one rule will assist the public in reviewing the potential application of the FFP to their need.

Specifically, these rules enact regulatory changes to create new FFP programs authorized in legislation in 2006 will be implemented under 50 CFR part 253, subpart B. Additionally, this rule will create new §§ 253.10 through 253.30.50. Part 253, subpart C (§§ 253.20 through 253.24) will be redesigned as Subpart C, sections 253.40 through 253.44, without change.

The RFA defines a small fishing business as one that has an annual revenue of $4.0 million or less. Additionally, "small governmental jurisdictions" are defined as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of fewer than 50,000. As defined in RFA, the small entities that this rule may affect include, but are not limited to, vessel owners, vessel operators, fish dealers, individual fishermen, small corporations, others engaged in commercial and recreational activities regulated by NOAA and native Alaskan governmental jurisdictions. In addition, the rule would affect some larger businesses. Notably, because the FFP is

a voluntary program that provides loans to qualified applicants, no entities—larger or small—would be directly regulated by this rule.

NMFS has examined the business size status of applicants approved by the FFP during the last eleven years during which the FFP has been a direct lender. During this period, the FFP approved 425 applications. Of these applications, 146, or 35 percent of the total number of businesses that could be determined to be small or large entities, were small businesses as defined by the SBA.[2] In addition, 221 applicants, or 53 percent of all applicants, were individual or sole proprietorships. Thus, most of the loans that have been recently issued by the FFP were to small entities.

The FFP approved loans for:

	Number	Percentage
Individuals/sole proprietorships	221	53
Small Business	146	35
Large Business	49	12

Since it codifies existing FFP statutes and policies, this action will not create new reporting requirements for small entities participating in the FFP. Although the FFP requires certain supporting documentation during the life of a loan, the FFP's requirements do not impose unusual burdens when compared to the burdens imposed by other lenders. Moreover, because the basic need for financing would continue to exist without the FFP, the small entities seeking financing would still need to comply with similar, if not identical, requirements imposed by another lender. Records required to participate in the FFP are usually within the normal business records already maintained by small business entities. The time required for small entities to meet these requirements would be less that five hours per application.

In addition, to ease burdens on loan applicants that are small entities, the proposed rules vary the scope of the requested information in accordance with the size and complexity of the applicant's operation. These rules request information from applicants that is already available to them, such as income tax returns, insurance policies, permits, licenses, etc. Depending on circumstances, the FFP may require other supporting documents, including internal financial statements, audited financial statements, property descriptions, and other documents that can be acquired at reasonable cost if they are not already available.

[2] There were nine records for which NMFS was unable to determine the size of the applicant.

The FFP has only positive impacts on small entities. It is a source of long-term capital and imposes no regulatory requirements on small business outside of those applying for financing. FFP applicants make a voluntary decision to use the Program. Both small and large entities benefit from the availability of long-term, fixed rate financing. CDQ groups and communities benefit from the positive economic opportunities that FFP lending provides.

Because participation is voluntary and requires considerable effort and the outlay of an application fee, all FFP applicants are assumed to have made a determination that using FFP financing incurs a benefit, such that the FFP's long-term, fixed rate financing provides a positive economic impact. Importantly, the FFP does not regulate or manage the affairs of its borrowers, and the regulations impose no additional compliance, operating or other fees or costs on small entities.

Because this regulation will impose no significant costs on any small entities, but rather will provide small and large entities with benefits, the economic impact on small entities, if any, is expected to be minimal at worst, but likely it will be positive. Accordingly, this rule will not substantially impact a significant number of small businesses.

As a result of this certification, an initial regulatory flexibility analysis is not required and none has been prepared.

List of Subjects in 50 CFR Part 253

Aquaculture, Community development groups, Direct lending, Financial assistance, Fisheries, Fishing, Individual fishing quota.

Dated: April 26, 2010.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Services, National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR part 253 is proposed to be amended by revising part 253 as follows:

PART 253B–FISHERIES ASSISTANCE PROGRAMS

Subpart A—General

Sec.
253.1 Purpose

Subpart B—Fisheries Finance Program

253.10 General definitions.
253.11 General FFP credit standards and requirements.
253.12 Credit application.
253.13 Initial investigation and approval.
253.14 Loan documents.
253.15 Recourse against other parties.
253.16 Actual cost.
253.17 Insurance.
253.18 Closing.
253.19 Dual-use CCF.
253.20 Fees.
253.21 Demand by guaranteed noteholder and payment.
253.22 Program operating guidelines.
253.23 Default and liquidation.
253.24 Enforcement violations and adverse actions.
253.25 Other administrative requirements.
253.26 Traditional loans.
253.27 IFQ financing.
253.28 Halibut sablefish IFQ loans.
253.29 CDQ loans.
253.30 Crab IFQ loans.
253.31–253.49 [Reserved]

Subpart C—Interjurisdictional Fisheries

253.50 Definitions.
253.51 Apportionment.
253.52 State projects.
253.53 Other funds.
253.54 Administrative requirements.

Authority: 46 U.S.C. 53701 and 16 U.S.C. 4101 *et seq.*

Subpart A—General

§ 253.1 Purpose.

(a) The regulations in this part pertain to fisheries assistance programs. Subpart B of these rules governs the Fisheries Finance Program (FFP or the Program), which makes capacity neutral long-term direct fisheries and aquaculture loans. The FFP does all credit investigations, makes all credit determinations and holds and services all credit collateral.

(b) Subpart C implements Title III of Public Law 99–659 (16 U.S.C. 4100 *et seq.*), which has two objectives:

(1) Promote and encourage State activities in support of the management of interjurisdictional fishery resources identified in interstate or Federal fishery management plans; and

(2) Promote and encourage management of interjurisdictional fishery resources throughout their range.

(c) The scope of this part includes guidance on making financial assistance awards to States or Interstate Commissions to undertake projects in support of management of injurisdictional fishery resources in both the executive economic zone (EEZ) and State waters, and to encourage States to enter into enforcement agreements with either the Department of Commerce or the Department of the Interior.

Subpart B—Fisheries Finance Program

§ 253.10 General definitions.

The terms used in this subpart have the following meanings:

Act means Chapter 537 of Title 46 of the U.S. Code, (46 U.S.C. 53701–35), as may be amended from time to time.

Actual cost means the sum of all amounts for a project paid by an obligor (or related person), as well as all amounts that the Program determines the obligor will become obligated to pay, as such amounts are calculated by § 253.16.

Applicant means the individual or entity applying for a loan (the prospective obligor).

Application means the documents provided to or requested by NMFS from an applicant to apply for a loan.

Application fee means 0.5 percent of the dollar amount of financing requested.

Approval in principle letter (AIP) means a written communication from NMFS to the applicant expressing the agency's commitment to provide financing for a project, subject to all applicable regulatory and Program requirements and in accordance with the terms and conditions contained in the AIP.

Aquaculture facility means land, structures, appurtenances, laboratories, water craft built in the U.S., and any equipment used for the hatching, caring for, or growing fish under controlled circumstances for commercial purposes, as well as the unloading, receiving, holding, processing, or distribution of such fish.

Captain means a vessel operator or a vessel master.

Capital Construction Fund (CCF), as described under 46 U.S.C. 53501–17, allows owners of eligible vessels to reserve capital for replacement vessels, additional vessels, reconstruction of vessels, or reconstructed vessels, built in the United States and documented under the laws of the United States, for operation in the fisheries of the United States.

Charter fishing means fishing from a vessel carrying a "passenger for hire," as defined in 46 U.S.C. 2101(21a), such passenger being engaged in recreational fishing, from whom consideration is contributed as a condition of carriage on the vessel, whether directly or indirectly flowing to the owner, charterer, operator, agent, or any other person having an interest in the vessel.

Citizen means a "citizen of the United States," as described in 46 U.S.C. 104, or an entity who is a citizen for the purpose of documenting a vessel in the coastwise trade under 46 U.S.C. 50501.

Crewman means any individual, other than a captain, a passenger for hire, or a fisheries observer working on a vessel that is engaged in fishing.

Demand means a noteholder's request that a debtor or guarantor pay a note's full principal and interest balance.

Facility means a fishery or an aquaculture facility.

Fish means finfish, mollusks, crustaceans and all other forms of aquatic animal and plant life, other than marine mammals and birds.

Fisheries harvest authorization means any transferable permit, license or other right, approval, or privilege to engage in fishing.

Fishery facility means land, land structures, water craft that do not engage in fishing, and equipment used for transporting, unloading, receiving, holding, processing, preserving, or distributing fish for commercial purposes (including any water craft used for charter fishing).

Fishing means:

(1) The catching, taking, or harvesting of fish;

(2) The attempted catching, taking, or harvesting of fish;

(3) Any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish;

(4) Any operations at sea in support of, or in preparation for, any activity described in (1) through (3) above.

(5) Fishing does not include any scientific research activity which is conduced by a scientific research vessel.

Fishing industry for the purposes of this part, means the broad sector of the national economy comprised of persons or entities that are engaged in or substantially associated with fishing, including aquaculture, charter operators, guides, harvesters, outfitters, processors, suppliers, among others, without regard to the location of their activity or whether they are engaged in fishing for wild stocks or aquaculture.

Guarantee means a guarantor's contractual promise to repay indebtedness if an obligor fails to repay as agreed.

Guarantee fee means one percent of a guaranteed note's average annual unpaid principal balance.

Guaranteed note means a promissory note from an obligor to a noteholder, the repayment of which the United States guarantees.

IFQ means Individual Fishing Quota, which is a Federal permit under a limited access system to harvest a quantity of fish, expressed by a unit or units representing a percentage of the total allowable catch of a fishery that may be received or held for exclusive use by a person. IFQ does not include community development quotas.

Noteholder means a guaranteed note payee.

Obligor means a party primarily liable for payment of the principal of or interest on an obligation, used interchangeably with the terms "note payor" or "notemaker."

Origination year means the year in which an application for a loan is accepted for processing.

Program means the Fisheries Finance Program, Financial Services Division, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

Project means:

(1) The refinancing of construction of a new fishing vessel or the financing or refinancing of a fishery or aquaculture facility or the refurbishing or purchase of an existing vessel or facility, including, but not limited to, architectural, engineering, inspection, delivery, outfitting, and interest costs, as well as the cost of any consulting contract the Program requires;

(2) The purchase or refinance of any limited access privilege, IFQ, fisheries access right, permit, or other fisheries harvest authorization, for which the actual cost of the purchase of such authorization would be eligible under the Act for direct loans;

(3) Activities (other than fishing capacity reduction, as set forth in part 600.1000 of this title) that assist in the transition to reduced fishing capacity;

(4) Technologies or upgrades designed to improve collection and reporting of fisherydependent data, to reduce bycatch, to improve selectivity or reduce adverse impacts of fishing gear, or to improve safety; or

(5) Any other activity that helps develop the U.S. fishing industry, including, but not limited to, measures designed or intended to improve a vessel's fuel efficiency, to increase fisheries exports, to develop an underutilized fishery, or to enhance financial stability, financial performance, growth, productivity, or any other business attribute related to fishing or fisheries.

RAM means the Restricted Access Management division in the Alaska Regional Office of the National Marine Fisheries Service or the office that undertakes the duties of this division to issue or manage quota shares.

Refinancing means newer debt that either replaces older debt or reimburses applicants for previous expenditures.

Refinancing/assumption fee means a one time fee assessed on the principal amount of an existing FFP note to be refinanced or assumed.

Refurbishing means any reconstruction, reconditioning, or other improvement of existing vessels or facilities, but does not include routine repairs or activities characterized as maintenance.

Security documents mean all documents related to the collateral

securing the U.S. Note's repayment and all other assurances, undertakings, and contractual arrangements associated with financing or guarantees provided by NMFS.

Underutilized fishery means any stock of fish (a) harvested below its optimum yield or (b) limited to a level of harvest or cultivation below that corresponding to optimum yield by the lack of aggregate facilities.

U.S. means the United States of America and, for citizenship purposes, includes the fifty states, Commonwealth of Puerto Rico, American Samoa, the Territory of the U.S. Virgin Islands, Guam, the Republic of the Marshall Islands, the Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession of the United States, or any political subdivision of any of them.

U.S. Note means a promissory note payable by the obligor to the United States.

Useful life means the period during which project property will, as determined by the Program, remain economically productive.

Vessel means any vessel documented under U.S. law and used for fishing.

Wise use means the development, advancement, management, conservation, and protection of fishery resources, that is not inconsistent with the National Standards for Fishery Conservation and Management (16 U.S.C. 1851) and any other relevant criteria, as may be specified in applicable statutes, regulations, Fishery Management Plans, or NMFS guidance.

§ 253.11 General FFP credit standards and requirements.

(a) *Principal.* Unless explicitly stated otherwise in these regulations or applicable statutes, the amount of any loan may not exceed 80 percent of actual cost, as such term is described in § 253.16; provided that, the Program may approve an amount that is less, in accordance with its credit determination.

(b) *Interest rate.* Each loan's annual interest rate will be 2 percent greater than the U.S. Department of Treasury's cost of borrowing public funds of an equivalent maturity at the time the loan closes.

(c) *Ability and experience requirements.* An obligor and the majority of its principals must demonstrate the ability, experience, resources, character, reputation, and other qualifications the Program deems necessary for successfully operating the project property and protecting the Program's interest in the project.

(d) *Lending restrictions.* Unless it can document that unique or extraordinary circumstances exist, the Program will not provide financing:

(1) For venture capital purposes; or,

(2) To an applicant who cannot document successful fishing industry ability and experience of a duration, degree, and nature that the Program deems necessary to successfully repay the requested loan.

(e) *Income and expense projections.* The Program, using conservative income and expense projections for the project property's operation, must determine that projected net earnings can service all debt, properly maintain the project property, and protect the Program's interest against risks of loss, including the industry's cyclical economics.

(f) *Working capital.* The Program must determine that a project has sufficient initial working capital to achieve net earnings projections, fund all foreseeable contingencies, and protect the Program's interest in the project. In making its determination, the Program will use a conservative assessment of an applicant's financial condition, and at the Program's discretion, some portion of projected working capital needs may be met by something other than current assets minus liabilities (*i.e.,* by a line or letter of credit, non-current assets readily capable of generating working capital, a guarantor with sufficient financial resources, etc.).

(g) *Audited financial statements.* Audited financial statements will ordinarily be required for any obligor with large or financially complex operations whose financial condition the Program believes cannot be otherwise assessed with reasonable certainty.

(h) *Consultant services.* Expert consulting services may be necessary to help the Program assess a project's economic, technical, or financial feasibility. The Program will notify the applicant if an expert is required. The Program will select and employ the necessary consultant, but require the applicant to reimburse the Program for any fees charged by the consultant. In the event that an application requires expert consulting services, the loan will not be closed until the applicant fully reimburses the Program. This cost may, at the Program's discretion, be included in the amount of the note. For a declined application, the Program may reimburse itself from the application fee as described in § 253.12, including any portion known as the commitment fee that could otherwise be refunded to the applicant.

(i) *Property inspections.* The Program may require adequate condition and valuation inspection of all property as the basis for assessing the property's worth and suitability for lending. The Program may also require these at specified periods during the life of the loan. These must be conducted by competent and impartial inspectors acceptable to the Program. Inspection cost will be at an applicant's expense. Those occurring before application approval may be included in actual cost, as actual cost is described in § 253.16.

(j) *First priority.* The Program shall have first position lien priority on all primary project property pledged as collateral (or adequate substitute collateral), unless the Program, at the request of the applicant, expressly waives this requirement in writing.

(k) *No additional liens.* All primary project property pledged as collateral, including any adequate substitute collateral, shall be free of additional liens, unless the Program, at the request of the applicant, expressly waives this requirement in writing.

(l) *General FFP credit standards apply.* Unless explicitly stated otherwise in these rules, all Fisheries Finance Program direct lending is subject to the above general credit standards and requirements found in §§ 253.12–253.30. The Program may adjust collateral, guarantee and other requirements to reflect individual credit risks.

(m) *Adverse legal proceedings.* The Program, at its own discretion, may decline or hold in abeyance any loan approval or disbursement(s) to any applicant found to have outstanding lawsuits, citations, hearings, liabilities, appeals, sanctions or other pending actions whose negative outcome could significantly impact, in the opinion of the Program, the financial circumstances of the applicant.

§ 253.12 Credit application.

(a) *Applicant.*

(1) An applicant must be a U.S. citizen and be eligible to document a vessel in the coastwise trade: and

(2) Only the legal title holder of project property, or its parent company (or the lessee of an appropriate long-term lease) may apply for a loan; and

(3) An applicant and the majority of its principals must generally have the ability, experience, resources, character, reputation, and other qualifications the Program deems necessary for successfully operating, utilizing, or carrying out the project and protecting the Program's interest; and

(4) Applicants should apply to the appropriate NMFS Regional Financial Services Branch to be considered.

(b) *Application fee.* An application fee of 0.5 percent of the dollar amount of an application is due when the application is formally accepted. Upon submission, 50 percent of the application fee, known as the "filing fee," is non-refundable; the remainder, known as the "commitment fee," may be refunded if the Program declines an application or an applicant withdraws its application before the Program issues an AIP letter, as described in § 253.13(e). The Program will not issue an AIP letter if any of the application fee remains unpaid. No portion of the application fee shall be refunded once the Program issues an AIP letter.

(c) *False statement.* A false statement on an application is grounds for denial or termination of funds, grounds for possible punishment by a fine or imprisonment as provided in 18 U.S.C. 1001 and an event of a security default.

§ 253.13 Initial investigation and approval.

(a) The Program shall undertake a due diligence investigation of every application it receives to determine if, in the Program's sole judgment, the application is both:

(1) Eligible for a loan because it meets applicable loan requirements; and

(2) Qualified for a loan because the project is deemed an acceptable credit risk.

(b) The Program will approve eligible and qualified applicants by evaluating the information obtained during the application and investigation process.

(c) Among other investigations, applicants may be subject to a background check, fisheries violations check and credit review. Background checks are intended to reveal if any key individuals associated with the applicant have been convicted of or are presently facing criminal charges such as fraud, theft, perjury, or other matters which significantly reflect on the applicant's honesty or financial integrity.

(d) The Program, at its own discretion, may decline or delay approval of any loans or disbursements to any applicant found to have outstanding citations, notices of violations, or other pending legal actions or unresolved claims.

(e) The Program may place any terms and conditions on such approvals that the Program, in its sole discretion, deems necessary and appropriate.

(f) Credit decision.

(1) The Program shall issue an AIP letter to approved applicants, which shall describe the terms and conditions of the loan, including (but not limited to) loan amounts, maturities, additional collateral, repayment sources or guarantees. Such terms and conditions are at the Program's sole discretion and shall also be incorporated in security documents that the Program prepares. An applicant's non-acceptance of any terms and conditions may result in an applicant's disqualification.

(2) Any application the Program deems ineligible or unqualified will be declined.

§ 253.14 Loan documents.

(a) *U.S. Note.*

(1) The U.S. Note will be in the form the Program prescribes.

(2) The U.S. Note evidences the obligor's indebtedness to the United States.

(i) For financing approved after October 11, 1996, the U.S. Note evidences the obligor's actual indebtedness to the U.S.; and

(ii) For financing originating before October 11, 1996, that continues to be associated with a Guaranteed Note, the U.S. Note shall evidence the obligor's actual indebtedness to the U.S. upon the Program's payment of any or all of the sums due under the Guaranteed Note or otherwise disbursed on the obligor's behalf.

(iii) The U.S. Note will, among other things, contain provisions to add to its principal balance all amounts the Program advances or incurs, including additional interest charges and costs incurred to protect its interest or accommodate the obligor.

(3) The U.S. Note shall be assignable by the Program, at its sole discretion.

(b) *Security documents.*

(1) Each security document will be in the form the Program prescribes.

(2) The Program will, at a minimum, require the pledge of adequate collateral, generally in the form of a security interest or mortgage against all property associated with a project or security as otherwise required by the Program.

(3) The Program will require such other security as it deems necessary and appropriate, given the circumstances of each obligor and the project.

(4) The security documents will, among other things, contain provisions to secure the repayment of all additional amounts the Program advances or incurs to protect its interest or accommodate the obligor, including additional interest charges and fees.

§ 253.15 Recourse against parties.

(a) *Form.* Recourse by borrowers or guarantors may be by a repayment guarantee, irrevocable letter of credit, additional tangible or intangible collateral, or other form acceptable to the Program.

(b) *Principals accountable.* The principal parties in interest, who ultimately stand most to benefit from the project, will ordinarily be held financially accountable for the project's performance. The Program may require recourse against:

(1) All major shareholders of a closely-held corporate obligor;

(2) The parent corporation of a subsidiary corporate obligor;

(3) The related business entities of the obligor if the Program determines that the obligor lacks substantial pledged assets other than the project property or is otherwise lacking in any credit factor required to approve the application;

(4) Any or all major limited partners;

(5) Non-obligor spouses of applicants or obligors in community property states; and/or

(6) Against any others it deems necessary to protect its interest.

(c) *Recourse against parties.* Should the Program determine that a secondary means of repayment from other sources is necessary (including the net worth of parties other than the obligor), the Program may require secured or unsecured recourse against any such secondary repayment sources.

(d) *Recourse unavailable.* Where appropriate recourse is unavailable, the conservatively projected net liquidating value of the obligor's assets (as such assets are pledged to the Program) must, in the Program's credit judgment, substantially exceed all projected Program exposure or other risks of loss.

§ 253.16 Actual cost.

Actual cost shall be determined as follows:

(a) The actual cost of a vessel shall be the sum of:

(1) The total cost of the project depreciated on a straight-line basis, over the project property's useful life, using a 10-percent salvage value; and

(2) The current market value of appurtenant limited access privileges or transferable limited access privileges vested in the name of the obligor, the subject vessel or their owners provided that such privileges are utilized by or aboard the subject vessel and will be pledged as collateral for the subject FFP financing.

(b) The actual cost of a facility shall be the sum of:

(1) The total cost of the project, not including land, depreciated on a straightline basis over the Project Property's useful life, using a 10-percent salvage value;

(2) The current market value of the land that will be pledged as collateral for the subject FFP financing, provided that such land is utilized by the facility; and

(3) The net present value of the payments due under a long term lease

of land or marine use rights, provided that they meet the following requirements:

(i) The project property must be located at such leased space or directly use such marine rights;

(ii) Such lease or marine use right must have a duration the Program deems sufficient; and

(iii) The lease or marine use right must be assigned to the Program such that the Program may foreclose and transfer such lease to another party.

(c) The actual cost of a transferable limited access privilege shall be determined as follows:

(1) For financing the purchase of limited access privileges, the actual cost shall be the purchase cost.

(2) For refinancing limited access privileges, the actual cost shall be the current market value.

(d) The actual cost of any Project that includes any combination of items described in subsections (a), (b) or (c) of this section shall be the sum of such calculations.

§ 253.17 Insurance.

(a) All insurable collateral property and other risks shall be continuously insured so long as any balance of principal or interest on a Program loan or guarantee remains outstanding.

(b) Insurers must be acceptable to the Program.

(c) Insurance must be in such forms and amounts and against such risks the Program deems necessary to protect the United States' interest.

(d) Insurance must be endorsed to include the requirements the Program deems necessary and appropriate.

(1) Normally and as appropriate, the Program will be named as an additional insured, mortgagee, or loss payee, for the amount of its interest; any waiver of this requirement must be in writing;

(2) Cancellation will require adequate advance written notice;

(3) The Program will be adequately protected against other insureds' breaches of policy warranties, negligence, omission, etc., in the case of marine insurance, vessel seaworthiness will be required;

(4) The insured must provide coverage for any other risk or casualty the Program may require.

§ 253.18 Closing.

(a) *Approval in principle letters.* Every closing will be in strict accordance with a final approval in principle letter.

(b) *Contracts.* Promissory notes, security documents, and any other documents the Program may require will be on standard Program forms that may not be altered without Program written approval. The Program will ordinarily prepare all contracts, except certain pledges involving real property or other matters involving local law, which will be prepared by each obligor's attorney at the direction and approval of the Program.

(c) *Additional requirements.* At its discretion the Program may require services from applicant's attorneys, other contractors or agents. Real property services required from an applicant's attorney or agent may include, but are not limited to: Title search, title insurance, mortgage and other document preparation, document execution and recording, escrow and disbursement, and legal opinions and other assurances. The Program will notify the applicant in advance if any such services are required of the applicant's attorneys, contractors or other agents. Applicants are responsible for all attorney's fees, as well as those of any other private contractor. Attorneys and other contractors must be satisfactory to the Program.

(d) *Closing schedules.* The Program will not be liable for adverse interest-rate fluctuations, loss of commitments, or other consequences of an inability by any of the parties to meet the closing schedule.

§ 253.19 Dual-use CCF.

The Program may require the pledge of a CCF account or annual deposits of some portion of the project property's net income into a dual-use CCF. A dual-use CCF provides the normal CCF tax-deferral benefits, but also gives the Program control of CCF withdrawals, recourse against CCF deposits, ensures an emergency refurbishing reserve (tax-deferred) for project property, and provides additional collateral.

§ 253.20 Fees.

(a) *Application fee.* See §§ 253.10 and 253.12(b), above.

(b) *Guarantee fee.* For existing Guaranteed Loans, an annual guarantee fee will be due in advance and will be based on the guaranteed note's repayment provisions for the prospective year. The first annual guarantee fee was due at guarantee closing. Each subsequent guarantee fee is due and payable on the guarantee closing's anniversary date. Each is fully earned when due, and shall not subsequently be refunded for any reason.

(c) *Refinancing or assumption fee.* The Program will assess a fee of one quarter of one (1) percent of the note to be refinanced or assumed. This fee is due upon application for refinancing or assumption of a guaranteed or direct loan. Upon submission, the fee shall be non-refundable. The Program may waive a refinancing or assumption fee's payment when the refinancing or assumption's primary purpose will benefit the United States.

(d) *Where payable.* Fees are payable by check to "U.S. Department of Commerce/NOAA." Other than those collected at application or closing, fees are payable by mailing checks to the "U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service," to such address as the Program may designate. To ensure proper crediting, each check should include the official case number the Program assigns.

§ 253.21 Demand by Guaranteed Noteholder and payment.

Every demand by the guaranteed noteholder must be delivered in writing to the Program and must include the noteholder's certified record of the date and amount of each payment made on the guaranteed note and the manner of its application. The only period during which a guaranteed noteholder can make demand for a payment default begins on the thirty-first day of the payment default and continues through the ninetieth day of a payment default. The noteholder must possess evidence of the demand's timely delivery.

§ 253.22 Program operating guidelines.

The Program may issue policy and administrative guidelines, as the need arises.

§ 253.23 Default and liquidation.

Upon default under the terms of any note, guarantee, security agreement, mortgage, or other security document, the Program shall take remedial actions including but not limited to, where appropriate, retaking or arrest of collateral, foreclosure, restructuring, debarment, referral for debt collection, or liquidation as it deems best able to protect the U.S. Government's interest.

§ 253.24 Enforcement violations and adverse actions.

(a) *Compliance with applicable law.* All applicants and Program participants shall comply with applicable law.

(b) *Applicant disqualification.*

(1) Any issuance of any citation or Notice of Violation and Assessment by NMFS enforcement or other enforcement authority may constitute grounds for the Program to:

(1) Delay application or approval processing;

(2) Delay loan closing;

(3) Delay disbursement of loan proceeds;

(4) Disqualify an applicant or obligor; or

(5) Declare default.

(2) The Program will not approve loans or disburse funds to any applicant found to have an outstanding, final and unappealable fisheries fine or other unresolved penalty until either: (i) Such fine is paid or penalty has been resolved; or (ii) the applicant enters into an agreement to pay the penalty and makes all payments or installments as they are due. Failure to pay or resolve any such fine or penalty in a reasonable period of time will result in the applicant's disqualification.

(c) *Foreclosure in addition to other penalties.* In the event that a person with an outstanding balance on a Program loan or guarantee violates any ownership, lease, use, or other provisions of applicable law, such person may be subject to foreclosure of property, in addition to any fines, sanctions, or other penalties.

§ 253.25 Other administrative requirements.

(a) *Debt Collection Act.* In accordance with the provisions of the Debt Collection Improvement Act of 1996, a person may not obtain any Federal financial assistance in the form of a loan (other than a disaster loan) or loan guarantee if the person has an outstanding debt (other than a debt under the Internal Revenue Code of 1986) with any Federal agency which is in a delinquent status, as determined under standards prescribed by the Secretary of the Treasury.

(b) *Certifications.* Applicants must submit a completed Form CD–511, "Certifications Regarding Debarment, Suspension and Other Responsibility Matters; Drug-Free Workplace Requirements and Lobbying," or its equivalent or successor form, if any.

(c) *Taxpayer identification.* An applicant classified for tax purposes as an individual, limited liability company, partnership, proprietorship, corporation, or legal entity is required to submit along with the application a taxpayer identification number (TIN) (social security number, employer identification number as applicable, or registered foreign organization number). Recipients who either fail to provide their TIN or provide an incorrect TIN may have application processing or funding suspended until the requirement is met.

(d) *Inspector General inquiry.* An audit of a Program loan may be conducted at any time. Auditors, selected at the discretion of the Program or other agency of the United States, shall have access to any and all books, documents, papers and records of the obligor or any other party to a financing that the auditor(s) deem(s) pertinent, whether written, printed, recorded, produced or reproduced by any mechanical, magnetic or other process or medium.

(e) *Paperwork Reduction Act.* The application requirements contained in these rules have been approved under OMB control number 0648–0012. The applications for the halibut/sablefish QS crew member eligibility certificate have been approved under OMB control number 0648–0272. Notwithstanding any other provisions of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

§ 253.26 Traditional loans.

(a) *Eligible projects.* Financing or refinancing up to 80 percent of a project's actual cost shall be available to any citizen who is determined to be eligible and qualified under the Act and these rules, except—

(1) The Program will not finance the cost of new vessel construction.

(2) The Program will not finance a vessel refurbishing project that materially increases an existing vessel's harvesting capacity.

(b) *Financing or refinancing.*

(1) Projects, other than those specified in paragraphs (a)(1) and (a)(2) of this section, may be financed, as well as refinanced.

(2) Notwithstanding paragraph (a)(1) of this section, the Program may refinance the construction cost of a vessel whose construction cost has already been financed (or otherwise paid) prior to the submission of a loan application.

(3) Notwithstanding paragraph (a)(2) of this section, the Program may refinance the refurbishing cost of a vessel whose initial refurbishing cost has already been financed (or otherwise paid) prior to the submission of a loan application.

(4) The Program may finance or refinance the purchase or refurbishment of any vessel or facility for which the Secretary has

(i) Accelerated and/or paid outstanding debts or obligations,

(ii) Acquired, or

(iii) Sold at foreclosure.

(c) *Existing vessels and facilities.* The Program may finance the purchase of an existing vessel or existing fishery facility if such vessel or facility will be refurbished in the United States and will be used in the fishing industry.

(d) *Fisheries modernization.* Notwithstanding any of this part, the Program may finance or refinance any

(1) Activities that assist in the transition to reduced fishing capacity; or

(2) Technologies or upgrades designed to

(i) Improve collection and reporting of fishery-dependent data,

(ii) Reduce bycatch,

(iii) Improve selectivity

(iv) Reduce adverse impacts of fishing gear, or

(v) To improve safety.

(e) *Guaranty transition.* Upon application by the obligor, any guaranteed loans originated prior to October 11, 1996, may be refinanced as direct loans, regardless of the original purpose of the guaranteed loan.

(f) *Maturity.* Maturity may not exceed 25 years, but shall not exceed the project's property useful life. The Program, at its sole discretion, may set a shorter maturity period.

(g) *Credit standards.* Traditional loans are subject to all Fisheries Finance Program general credit standards and requirements. Collateral, guarantee and other requirements may be adjusted in accordance with the Program's assessment of individual credit risks.

§ 253.27 IFQ financing.

The Program may finance or refinance the project cost of purchasing, including the reimbursement of obligors for expenditures previously made for purchasing, individual fishing quotas in accordance with the applicable sections of the Magnuson-Stevens Fishery Conservation and Management Act or any other statute.

§ 253.28 Halibut sablefish IFQ loans.

(a) *Specific definitions.* For the purposes of this section, the following definitions apply:

(1) *Entry-level fishermen* means fishermen who do not own any IFQ in the year they apply for a loan.

(2) *Fishermen who fish from small vessels* means fishermen wishing to purchase IFQ for use on Category B, Category C, or Category D vessels, but do not own, in whole or in part, any Category A or Category B vessels, as such vessels are defined in 50 CFR 679.40(a)(5) of this title.

(3) *Halibut sablefish quota share* means a halibut or sablefish permit, the face amount of which is used as the basis for the annual calculation of a person's halibut or sablefish IFQ, also abbreviated as "HSQS" or "halibut/sablefish QS."

(4) *Halibut/Sablefish IFQ* means the annual catch limit of halibut or sablefish that may be harvested by a person who

is lawfully allocated halibut or sablefish quota share, a harvest privilege for a specific portion of the total allowable catch of halibut or sablefish.

(b) *Entry level fishermen.* The Program may finance up to 80 percent of the cost of purchasing HSQS by an entry level fisherman who:

(1) Does not own any halibut/sablefish QS during the origination year;

(2) Applies for a loan to purchase a quantity of halibut/sablefish QS that is not greater than the equivalent of 8,000 lb. (3,628.7 kg) of IFQ during the origination year;

(3) Possesses the appropriate transfer eligibility documentation duly issued by RAM for HSQS;

(4) Intends to be present aboard the vessel, as may be required by applicable regulations; and

(5) Meets all other Program eligibility, qualification, lending and credit requirements.

(c) *Fishermen fishing from small vessels.* The Program may finance up to 80 percent of the cost of purchasing HSQS by a fisherman who fishes from a small vessel provided that any such fisherman shall:

(1) Apply for a loan to purchase halibut or sablefish QS for use on vessel Categories B, C, or D, as defined under 50 CFR 679.40(a)(5) of this title;

(2) Does not own an aggregate quantity of halibut/sablefish QS (including the loan QS) is not more than the equivalent of 50,000 lb. (22,679.6 kg) of IFQ during the origination year;

(3) Does not own, in whole or in part, directly or indirectly (including through stock or other ownership interest) any vessel of the type that would have been assigned Category A or Category B HSQS under 50 CFR 679.40(a)(5);

(4) Possesses the appropriate transfer eligibility documentation duly issued by the RAM for HSQS;

(5) Intends to be present aboard the vessel, as may be required by applicable regulations, as IFQ associated with halibut/sablefish QS financed by the loan is harvested; and

(6) Shall meet all other Program eligibility, qualification, lending and credit requirements.

(d) *Refinancing.*

(1) The Program may refinance any existing debts associated with HSQS an applicant currently holds, provided that—

(i) The HSQS being refinanced would have been eligible for Program financing at the time the applicant purchased it, and

(ii) The applicant meets the Program's applicable lending requirements.

(2) The refinancing is in an amount up to 80 percent of HSQS' current market value, and subject to the limitation that the Program will not disburse any amount that exceeds the outstanding principal balance, plus accrued interest (if any), of the existing HSQS debt being refinanced.

(3) In the event that the current market value of HSQS and principal loan balance do not meet the 80 percent requirement in paragraph (d)(2) of this section, applicants seeking refinancing may be required to provide additional down payment.

(e) *Maturity.* Loan maturity may not exceed 25 years, but may be shorter depending on credit and other considerations.

(f) *Repayment.* Repayment will be by equal quarterly installments of principal and interest.

(g) *Security.* Although quota share(s) will be the primary collateral for a HSQS loan, the Program may require additional security pledges to maintain the priority of the Program's security interest. The Program, at its option, may also require all parties with significant ownership interests to personally guarantee loan repayment for any applicant that is a corporation, partnership, or other entity. Subject to the Program's credit risk determination, some projects may require additional security, collateral, or credit enhancement.

(h) *Crew member transfer eligibility certification.* The Program will accept RAM certification as proof that applicants are eligible to hold HSQS. The application of any person determined by RAM to be unable to receive such certification will be declined. Applicants who fail to obtain appropriate transfer eligibility certification within 45 working days of the date of application may lose their processing priority.

(i) *Program credit standards.* HSQS loans, regardless of purpose, are subject to all Program general credit standards and requirements. Collateral, guarantee and other requirements may be adjusted to individual credit risks.

§ 253.29 CDQ loans.

(a) *FFP actions.* The Program may finance or refinance up to 80 percent of a project's actual cost.

(b) *Eligible projects.* Eligible projects include the purchase of all or part of ownership interests in fishing or processing vessels, shoreside fish processing facilities, permits, quota, and cooperative rights in any of the Bering Sea and Aleutian Islands fisheries.

(c) *Eligible entities.* The following communities, in accordance with applicable law and regulations are eligible to participate in the loan program.

(1) The villages of Akutan, Atka, False Pass, Nelson Lagoon, Nikolski, and Saint George through the Aleutian Pribilof Island Community Development Association.

(2) The villages of Aleknagik, Clark's Point, Dillingham, Egegik, Ekuk, Ekwok, King Salmon/Savonoski, Levelock, Manokotak, Naknek, Pilot Point, Port Heiden, Portage Creek, South Naknek, Togiak, Twin Hills, and Ugashik through the Bristol Bay Economic Development Corporation.

(3) The village of Saint Paul through the Central Bering Sea Fishermen's Association.

(4) The villages of Chefornak, Chevak, Eek, Goodnews Bay, Hooper Bay, Kipnuk, Kongiganak, Kwigillingok, Mekoryuk, Napakiak, Napaskiak, Newtok, Nightmute, Oscarville, Platinum, Quinhagak, Scammon Bay, Toksook Bay, Tuntutuliak, and Tununak through the Coastal Villages Region Fund.

(5) The villages of Brevig Mission, Diomede, Elim, Gambell, Golovin, Koyuk, Nome, Saint Michael, Savoonga, Shaktoolik, Stebbins, Teller, Unalakleet, Wales, and White Mountain through the Norton Sound Economic Development Corporation.

(6) The villages of Alakanuk, Emmonak, Grayling, Kotlik, Mountain Village, and Nunam Iqua through the Yukon Delta Fisheries Development Association.

(7) Any new groups established by applicable law.

(d) *Loan terms.*

(1) CDQ loans may have terms up to thirty years, but shall not exceed the project's property useful life. The Program, at its sole discretion, may set a shorter maturity period.

(2) CDQ loans are subject to all Fisheries Finance Program general credit standards and requirements. Collateral, guarantee and other requirements may be adjusted to individual credit risks.

§ 253.30 Crab IFQ loans.

(a) *Specific definitions.* For the purposes of this section, the following definitions apply:

(1) *Crab* means those crab species managed under the Fishery Management Plan for Bering Sea/Aleutian Island (BSAI) King and Tanner Crab.

(2) *Crab FMP* means the Fishery Management Plan for BSAI King and Tanner Crab.

(3) *Crab quota share* means a BSAI King and Tanner Crab permit, the base amount of which is used as a basis for

the annual calculation of a person's Crab IFQ, also abbreviated as "Crab QS."

(b) *Crab captains or crewmen.* The Program may finance up to 80 percent of the cost of purchasing Crab QS by a citizen:

(1) Who is or was:

(i) A captain of a crab fishing vessel, or

(ii) A crew member of a crab fishing vessel;

(2) Who has been issued the appropriate documentation of eligibility by RAM;

(3) Whose aggregate holdings of QS will not exceed the aggregate limit on Crab QS holdings that may be in effect in the Crab FMP implementing regulations or applicable statutes in effect at the time of loan closing; and will not hold either individually or collectively, based on the initial QS pool, as published in 50 CFR part 680, Table 8;

(4) Who, at the time of initial application, meets all other applicable eligibility requirements to fish for crab or hold Crab QS contained in the Crab FMP implementing regulations or applicable statutes in effect at the time of loan closing.

(c) *Refinancing.*

(1) The Program may refinance any existing debts associated with Crab QS that an applicant currently holds, provided that:

(i) The Crab QS being refinanced would have been eligible for Program financing at the time the applicant purchased it;

(ii) The applicant meets the Program's applicable lending requirements; and

(iii) The applicant would meet the requirements found in the Crab FMP implementing regulations at the time any such refinancing loan would close.

(2) The Program may refinance an amount up to 80 percent of Crab QS's current market value, subject to the limitation that the Program will not disburse any amount that exceeds the outstanding principal balance, plus accrued interest (if any), of the existing Crab QS debt being refinanced.

(3) In the event that the current market value of Crab QS and current principal balance do not meet the 80 percent requirement in paragraph (c)(2) of this section, applicants seeking refinancing may be required to provide additional down payment.

(d) *Maturity.* Loan maturity may not exceed 25 years, but may be shorter depending on credit and other considerations.

(e) *Repayment.* Repayment schedules will be set by the loan documents.

(f) *Security.* Although the quota share will be the primary collateral for a Crab QS loan, the Program may require additional security pledges to maintain the priority of the Program's security interest. The Program, at its option, may also require all parties with significant ownership interests to personally guarantee loan repayment for any applicant that is a corporation, partnership, or other entity. Subject to the Program's credit risk determination, some projects may require additional security, collateral, or credit enhancement.

(g) *Crew member transfer eligibility certification.* The Program will accept RAM transfer eligibility certification as proof that applicants are eligible to hold Crab QS. The application of any person determined by RAM to be unable to receive such certification will be declined. Applicants who fail to obtain appropriate transfer eligibility certification within 45 working days of the date of application may lose their processing priority.

(h) *Crab Quota Share Ownership Limitation.* A program obligor must comply with all applicable maximum amounts, as may be established by NMFS regulations, policy or North Pacific Fishery Management Council action.

(i) *Program credit standards.* Crab QS loans are subject to all Program general credit standards and requirements. Collateral, guarantee and other requirements may be adjusted to individual credit risks.

Subpart C—Interjurisdictional Fisheries

§ 253.50 Definitions.

The terms used in this subpart have the following meanings:

Act means the Interjurisdictional Fisheries Act of 1986, Public Law 99–659 (Title III).

Adopt means to implement an interstate fishery management plan by State action or regulation.

Commercial fishery failure means a serious disruption of a fishery resource affecting present or future productivity due to natural or undetermined causes. It does not include either:

(1) The inability to harvest or sell raw fish or manufactured and processed fishery merchandise; or

(2) Compensation for economic loss suffered by any segment of the fishing industry as the result of a resource disaster.

Enforcement agreement means a written agreement, signed and dated, between a state agency and either the Secretary of the Interior or Secretary of Commerce, or both, to enforce Federal and state laws pertaining to the protection of interjurisdictional fishery resources.

Federal fishery management plan means a plan developed and approved under the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

Fisheries management means all activities concerned with conservation, restoration, enhancement, or utilization of fisheries resources, including research, data collection and analysis, monitoring, assessment, information dissemination, regulation, and enforcement.

Fishery resource means finfish, mollusks, and crustaceans, and any form of marine or Great Lakes animal or plant life, including habitat, other than marine mammals and birds.

Interjurisdictional fishery resource means:

(1) A fishery resource for which a fishery occurs in waters under the jurisdiction of one or more states and the U.S. Exclusive Economic Zone; or

(2) A fishery resource for which an interstate or a Federal fishery management plan exists; or

(3) A fishery resource which migrates between the waters under the jurisdiction of two or more States bordering on the Great Lakes.

Interstate Commission means a commission or other administrative body established by an interstate compact.

Interstate compact means a compact that has been entered into by two or more states, established for purposes of conserving and managing fishery resources throughout their range, and consented to and approved by Congress.

Interstate Fisheries Research Program means research conducted by two or more state agencies under a formal interstate agreement.

Interstate fishery management plan means a plan for managing a fishery resource developed and adopted by the member states of an Interstate Marine Fisheries Commission, and contains information regarding the status of the fishery resource and fisheries, and recommends actions to be taken by the States to conserve and manage the fishery resource.

Landed means the first point of offloading fishery resources.

NMFS Regional Director means the Director of any one of the five National Marine Fisheries Service regions.

Project means an undertaking or a proposal for research in support of management of an interjurisdictional fishery resource or an interstate fishery management plan.

Research means work or investigative study, designed to acquire knowledge of fisheries resources and their habitat.

Secretary means the Secretary of Commerce or his/her designee.

State means each of the several states, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, or the Commonwealth of the Northern Mariana Islands.

State agency means any department, agency, commission, or official of a state authorized under the laws of the State to regulate commercial fisheries or enforce laws relating to commercial fisheries.

Value means the monetary worth of fishery resources used in developing the apportionment formula, which is equal to the price paid at the first point of landing.

Volume means the weight of the fishery resource as landed, at the first point of landing.

§ 253.51 Apportionment.

(a) *Apportionment formula.* The amount of funds apportioned to each state is to be determined by the Secretary as the ratio which the equally weighted average of the volume and value of fishery resources harvested by domestic commercial fishermen and landed within such state during the 3 most recent calendar years for which data satisfactory to the Secretary are available bears to the total equally weighted average of the volume and value of all fishery resources harvested by domestic commercial fishermen and landed within all of the states during those calendar years.

(1) The equally weighted average value is determined by the following formula:

$$\frac{\text{Volume of X State}}{\text{Volume of all States}} = \text{A percent}$$

$$\frac{\text{Value of X State}}{\text{Value of all States}} = \text{B percent}$$

$$\frac{[\text{A\%} + \text{B\%}]}{2} = \text{State percentage used to determine state's share of the total available funds}$$

(2) Upon appropriation of funds by Congress, the Secretary will take the following actions:

(i) Determine each state's share according to the apportionment formula.

(ii) Certify the funds to the respective NMFS Regional Director.

(iii) Instruct NMFS Regional Directors to promptly notify states of funds' availability.

(b) No state, under the apportionment formula in paragraph (a) of this section, that has a ratio of one-third of 1 percent or higher may receive an apportionment for any fiscal year that is less than 1 percent of the total amount of funds available for that fiscal year.

(c) If a State's ratio under the apportionment formula in paragraph (b) of this section is less than one-third of 1 percent, that state may receive funding if the state:

(1) Is signatory to an interstate fishery compact;

(2) Has entered into an enforcement agreement with the Secretary and/or the Secretary of the Interior for a fishery that is managed under an interstate fishery management plan;

(3) Borders one or more of the Great Lakes;

(4) Has entered into an interstate cooperative fishery management agreement and has in effect an interstate fisheries management plan or an interstate fisheries research Program; or

(5) Has adopted a Federal fishery management plan for an interjurisdictional fishery resource.

(d) Any state that has a ratio of less than one-third of 1 percent and meets any of the requirements set forth in paragraphs (c)(1) through (5) of this section may receive an apportionment for any fiscal year that is not less than 0.5 percent of the total amount of funds available for apportionment for such fiscal year.

(e) No state may receive an apportionment under this section for any fiscal year that is more than 6 percent of the total amount of funds available for apportionment for such fiscal year.

(f) *Unused apportionments.* Any part of an apportionment for any fiscal year to any state:

(1) That is not obligated during that year;

(2) With respect to which the state notifies the Secretary that it does not wish to receive that part; or

(3) That is returned to the Secretary by the state, may not be considered to be appropriated to that state and must be added to such funds as are appropriated for the next fiscal year. Any notification or return of funds by a state referred to in this section is irrevocable.

§ 253.52 State projects.

(a) *General—*

(1) *Designation of state agency.* The Governor of each state shall notify the Secretary of which agency of the state government is authorized under its laws to regulate commercial fisheries and is, therefore, designated receive financial assistance awards. An official of such agency shall certify which official(s) is authorized in accordance with state law to commit the state to participation under the Act, to sign project documents, and to receive payments.

(2) States that choose to submit proposals in any fiscal year must so notify the NMFS Regional Director before the end of the third quarter of that fiscal year.

(3) Any state may, through its state agency, submit to the NMFS Regional Director a completed NOAA Grants and Cooperative Agreement Application Package with its proposal for a project, which may be multiyear. Proposals must describe the full scope of work, specifications, and cost estimates for such project.

(4) States may submit a proposal for a project through, and request payment to be made to, an Interstate Fisheries Commission. Any payment so made shall be charged against the apportionment of the appropriate state(s). Submitting a project through one of the Commissions does not remove the matching funds requirement for any state, as provided in paragraph (c) of this section.

(b) *Evaluation of projects.* The Secretary, before approving any proposal for a project, will evaluate the proposal as to its applicability, in accordance with 16 U.S.C. 4104(a)(2).

(c) *State matching requirements.* The Federal share of the costs of any project conducted under this subpart, including a project submitted through an Interstate Commission, cannot exceed 75 percent of the total estimated cost of the project, unless:

(1) The state has adopted an interstate fishery management plan for the fishery resource to which the project applies; or

(2) The state has adopted fishery regulations that the Secretary has determined are consistent with any Federal fishery management plan for the species to which the project applies, in which case the Federal share cannot

exceed 90 percent of the total estimated cost of the project.

(d) *Financial assistance award.* If the Secretary approves or disapproves a proposal for a project, he or she will promptly give written notification, including, if disapproved, a detailed explanation of the reason(s) for the disapproval.

(e) *Restrictions.*

(1) The total cost of all items included for engineering, planning, inspection, and unforeseen contingencies in connection with any works to be constructed as part of such a proposed project shall not exceed 10 percent of the total cost of such works, and shall be paid by the state as a part of its contribution to the total cost of the project.

(2) The expenditure of funds under this subpart may be applied only to projects for which a proposal has been evaluated under paragraph (b) of this section and approved by the Secretary, except that up to $25,000 each fiscal year may be awarded to a state out of the state's regular apportionment to carry out an "enforcement agreement." An enforcement agreement does not require state matching funds.

(f) *Prosecution of work.* All work must be performed in accordance with applicable state laws or regulations, except when such laws or regulations are in conflict with Federal laws or regulations such that the Federal law or regulation prevails.

§ 263.53 Other funds.

(a) *Funds for disaster assistance.*

(1) The Secretary shall retain sole authority in distributing any disaster assistance funds made available under section 308(b) of the Act. The Secretary may distribute these funds after he or she has made a thorough evaluation of the scientific information submitted, and has determined that a commercial fishery failure of a fishery resource arising from natural or undetermined causes has occurred. Funds may only be used to restore the resource affected by the disaster, and only by existing methods and technology. Any fishery resource used in computing the states' amount under the apportionment formula in § 253.601(a) will qualify for funding under this section. The Federal share of the cost of any activity conducted under the disaster provision of the Act shall be limited to 75 percent of the total cost.

(2) In addition, pursuant to section 308(d) of the Act, the Secretary is authorized to award grants to persons engaged in commercial fisheries, for uninsured losses determined by the Secretary to have been suffered as a direct result of a fishery resource disaster. Funds may be distributed by the Secretary only after notice and opportunity for public comment of the appropriate limitations, terms, and conditions for awarding assistance under this section. Assistance provided under this section is limited to 75 percent of an uninsured loss to the extent that such losses have not been compensated by other Federal or State Programs.

(b) *Funds for interstate commissions.* Funds authorized to support the efforts of the three chartered Interstate Marine Fisheries Commissions to develop and maintain interstate fishery management plans for interjurisdictional fisheries will be divided equally among the Commissions.

§ 253.54 Administrative requirements.

Federal assistance awards made as a result of this Act are subject to all Federal laws, Executive Orders, Office of Management and Budget Circulars as incorporated by the award; Department of Commerce and NOAA regulations; policies and procedures applicable to Federal financial assistance awards; and terms and conditions of the awards.

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BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 75, No. 86
Wednesday, May 5, 2010

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Seek OMB Approval To Collect Information: Revision of a Form Pertaining to the Peer Review of ARS Research Projects

AGENCY: Agricultural Research Service (ARS), USDA.

ACTION: Notice and request for comments.

SUMMARY: The proposed revised form for the information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995 and OMB implementing regulations. The Department is soliciting public comments on the subject proposal.

DATES: Written comments on this notice must be received by July 9, 2010.

ADDRESSES: Address all comments concerning this notice to: Michael S. Strauss, Peer Review Program Coordinator, Office of Scientific Quality Review; Agricultural Research Agency, USDA; 5601 Sunnyside Avenue, Beltsville, Maryland; 20705; Phone: 301–504–3283; Fax: 301–504–1251.

FOR FURTHER INFORMATION CONTACT: Michael S. Strauss, 301–504–3283.

SUPPLEMENTARY INFORMATION: The Office of Scientific Quality Review will seek approval from OMB to revise one existing form so as to comply with new Transportation Security Administration information needs for travelers. All forms are transferred and received in an electronic storage format that does not include on-line access.

Abstract: The Office of Scientific Quality Review was established in September of 1999 as a result of the Agricultural Research, Extension, and Education Reform Act 1998 (“The Act”)(Pub. L. 105–185). The Act included mandates to perform scientific peer reviews of all research activities conducted by the USDA. The Office manages the ARS peer review system by centrally planning peer panel reviews for ARS research projects on a five-year cycle.

Each set of reviews is assigned a chairperson to govern the review process. The majority of the peer reviewers are non-ARS scientists. Peer review panels are convened to provide in-depth discussion and review of the research project plans. Each panel reviewer receives information on between 1 and 20 ARS research projects.

On average, 220 research projects are reviewed annually by an estimated 100 reviewers; whereby approximately 200 are reviewed by panel and approximately 20 are reviewed through an ad hoc process. The organization and management of this peer review system, particularly panel reviews, is highly dependent on the use of forms.

The Office of Scientific Quality Review will seek OMB approval of the revised Panelist Information Form-USDA uses this form to gather up-to-date background information about the reviewer, as well as information necessary for the payment of the honorarium and, where necessary, for arranging travel. This form requires an original signature. Because of the sensitive nature of information on this form it is not copied or stored in an electronic file. The copy received is held only in a single locked file and destroyed when no longer needed, and in accordance with the relevant Records Retention Policies and under conditions mandated by the Privacy Act. The revised form re-orders information requested so as to make clearer the purpose for each and adds a request for the respondent to indicate their gender, as required by the Transportation Security Administration.

Estimate of Burden: The burden is the minimum required to achieve program objectives. The overall information collection frequency is the minimum consistent with program objectives. Revision of this form neither increases nor decreases the already-approved burden for this information collection.

The Panelist Information Form takes about 20 minutes to complete. It resembles a typical request for personal information; many reviewers provide the same data as grant reviewers in other peer review programs. It also includes information necessary for arranging government-sponsored travel and for paying an honorarium, when needed.

Respondents and Estimated Number of Respondents: No change to the number of respondents is anticipated with this revision.

Frequency of Response: No change to the frequency of response is anticipated with this revision.

Estimated Total Annual Burden on Respondents: No change to the estimated total annual burden is anticipated with this revision.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C. chap. 35.

Comments: The Notice is soliciting comments from members of the public and affected agencies concerning revision of the form in the approved collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of ARS functions, including whether the information will have practical utility; (2) Evaluate the accuracy of the estimated burden from proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

All responses to this notice will be summarized and included in the request for OMB approval.

All comments will become a matter of public record.

Dated: April 16, 2010.

Caird E. Rexroad, Jr.,

Associate Administrator for Operations and Management, Agricultural Research Service, USDA.

[FR Doc. 2010–10560 Filed 5–4–10; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Intent To Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of intent.

SUMMARY: Notice is hereby given that the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to Renewable Organics, LLC of Pinehurst, North Carolina, an exclusive license to U.S. Patent Application Serial No. 12/026,346, "Process for Removing and Recovering Phosphorus from Animal Waste," filed on February 5, 2008.

DATES: Comments must be received on or before June 4, 2010.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Rm. 4–1174, Beltsville, Maryland 20705–5131.

FOR FURTHER INFORMATION CONTACT: June Blalock of the Office of Technology Transfer at the Beltsville address given above; telephone: 301–504–5989.

SUPPLEMENTARY INFORMATION: The Federal Government's patent rights in this invention are assigned to the United States of America, as represented by the Secretary of Agriculture. It is in the public interest to so license this invention as Renewable Organics, LLC of Pinehurst, North Carolina has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within thirty (30) days from the date of this published Notice, the Agricultural Research Service receives written evidence and argument which establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7.

Richard J. Brenner,

Assistant Administrator.

[FR Doc. 2010–10557 Filed 5–4–10; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS-2010-0050]

Animal Traceability; Public Meetings

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice of public meetings.

SUMMARY: This is a notice to inform the public of three upcoming meetings in Kansas City, MO, Riverdale, MD, and Denver, CO, to provide an opportunity for stakeholders to offer their input on the new framework being developed for animal disease traceability. Additional meetings are currently being planned and will be announced in a future notice. The meetings are being organized by the Animal and Plant Health Inspection Service.

DATES: The meetings will be held on May 11, May 13, and May 17, 2010, from 8 a.m. to 4 p.m. each day.

ADDRESSES: The public meeting on May 11, 2010, will be held at the Holiday Inn Kansas City SE—Waterpark, 9103 East 39th Street, Kansas City, MO 64133. The public meeting on May 13, 2010, will be held at the USDA Center at Riverside, 4700 River Road, Riverdale, MD 20737. The public meeting on May 17, 2010, will be held at the Crowne Plaza, Denver International Airport, 15500 East 40th Avenue, Denver, CO 80239.

FOR FURTHER INFORMATION CONTACT: Mr. Neil Hammerschmidt, Program Manager, Animal Disease Traceability, VS, APHIS, 4700 River Road Unit 46, Riverdale, MD 20737-1231; (301) 734-5571.

SUPPLEMENTARY INFORMATION: The U.S. Department of Agriculture (USDA) is currently developing a new, flexible framework for animal disease traceability in the United States. In keeping with its commitment to partnering with States, Tribal Nations, and industry to address many of the details of the infrastructure of this program, including possible regulations, the USDA took the initial step of hosting a State/Tribal forum on animal disease traceability in Kansas City, MO, on March 18 and 19, 2010. Information on the proceedings of the State/Tribal forum is available to the public for review and comment at (*http://www.aphis.usda.gov/traceability/forum/index.shtml*). We are now planning to host three public meetings to discuss animal disease traceability. The meetings have been set for Kansas City, MO, Riverdale, MD, and Denver, CO (see **ADDRESSES**).

Tentative topics to be discussed at the upcoming meetings include:

1. The framework for a proposed animal disease traceability rule.

2. Specific details that would help form the animal disease traceability rule.

Written statements on meeting topics, as well as on the proceedings of the March 2010 State/Tribal forum, may be filed with the USDA through May 31, 2010, via the Federal eRulemaking Portal at (*http://www.regulations.gov/fdmspublic/component/main?main=DocketDetail&d=APHIS-2010-0050*) or by sending them to the person listed under **FOR FURTHER INFORMATION CONTACT**. Please refer to Docket No. APHIS-2010-0050 when submitting your statements.

Travel directions to the USDA Center at Riverside are available on the Internet at (*http://www.aphis.usda.gov/plant_health/general_info/directions_riverdale.shtml*). Picture identification is required to gain access to the building. Parking is available next to the building for a $4 fee. The nearest Metro station is the College Park station on the Green Line, which is within walking distance.

For the Denver meeting, there will be a free hotel shuttle to and from Denver International Airport.

Done in Washington, DC, this 30th day of April 2010.

Gregory L. Parham

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2010–10561 Filed 5–4–10; 7:19 am]

BILLING CODE 3410–34–S

DEPARTMENT OF COMMERCE

International Trade Administration

Proposed Information Collection: U.S. Government Trade Event Information Request

AGENCY: International Trade Administration.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before July 6, 2010.

ADDRESSES: Direct all written comments to Diana Hynek, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *dHynek@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Xiaobing Feng, (202) 482–6427, *Xiaobing.Feng@trade.gov,* fax: (202) 482–3508.

SUPPLEMENTARY INFORMATION:

I. Abstract

The U.S. Government (USG) Trade Event Information Request (Form ITA–4136P) is sent to any firm that requests senior-level USG witnessing of a

commercial milestone, *e.g.,* an announcement, contract, or business agreement signing, at a public event designed to highlight a company's commercial success in an overseas project or procurement competition. The Advocacy Center, appropriate ITA officials, U.S. Embassies/Consulates worldwide, and other federal government agencies that provide advocacy support to U.S. firms, will request firm(s) seeking USG advocacy support to complete the Trade Event Information Request form.

This information is needed to ensure that the subject milestone to be witnessed is either a legally-binding contract or a commercially-significant announcement, which includes highlighted U.S. export content. Furthermore, the information contained on the form helps the U.S. Department of Commerce staff determine if USG association with the event or activity is in the best interest of the USG. The information collected permits staff to review details of the milestone to be witnessed, and to make an evaluation on: (a) Whether the contract or announcement is actually ready for final signature or public disclosure; (b) whether additional USG advocacy may be required prior to the event in question; (c) whether the level of U.S. company participation and foreign government official participation, if appropriate, is at a level high enough to recommend senior-level USG participation; and (d) where U.S. export content associated with the contract/announcement would be sourced. If this information were not collected, staff could not make the appropriate evaluation prior to USG senior-level involvement.

II. Method of Collection

Information will be collected by paper format and via e-mail.

III. Data

OMB Control Number: 0625–0238.
Form Number(s): ITA–4136P.
Type of Review: Regular submission.
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 400.
Estimated Time per Response: 30 minutes.
Estimated Total Annual Burden Hours: 200.
Estimated Total Annual Cost to Public: $0.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: April 30, 2010.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2010–10534 Filed 5–4–10; 8:45 am]

BILLING CODE 3510–FP–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 27–2010]

Foreign-Trade Zone 177—Mount Vernon/Evansville, IN; Application for Reorganization Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Ports of Indiana, grantee of Foreign-Trade Zone 177, requesting authority to reorganize the zone under the alternative site framework (ASF) adopted by the Board (74 FR 1170, 1/12/09; correction 74 FR 3987, 1/22/09). The ASF is an option for grantees for the establishment or reorganization of general-purpose zones and can permit significantly greater flexibility in the designation of new "usage-driven" FTZ sites for operators/users located within a grantee's "service area" in the context of the Board's standard 2,000-acre activation limit for a general-purpose zone project. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u) and the regulations of the Board (15 CFR part 400). It was formally filed on April 22, 2010.

FTZ 177 was approved by the Board on March 12, 1991 (Board Order 513, 56 F.R. 12155; March 22, 1991) and expanded on July 2, 1993 (Board Order 648, 58 F.R. 37908; July 14, 1993). The general-purpose zone currently consists of the following sites: *Site 1:* (40 acres)—within the Southwind Maritime Centre, located at 2751 Bluff Road, Mount Vernon (Posey County); *Site 2:* (30,000 sq. ft.)—Central Warehouse, Inc., located at 301 East Indiana Street, Evansville (Vanderburgh County); *Site 3:* (40,000 sq. ft.) Morton Avenue Warehouse, Inc., located at 2504 Lynch Road, Evansville (Vanderburgh County); and, *Site 4:* (78 acres) Evansville Regional Airport, located at 7801 Bussing Drive, Evansville (Vanderburgh County), Indiana.

The grantee's proposed service area under the ASF would be Vanderburgh, Dubois, Pike, Gibson, Knox, Daviess, Spencer, Warrick and Posey Counties, Indiana, as described in the application. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Owensboro-Evansville Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project to include all of the existing sites as "magnet" sites. The ASF allows for the possible exemption of one magnet site from the "sunset" time limits that generally apply to sites under the ASF, and the applicant proposes that Site 1 be so exempted. No usage-driven sites are being requested at this time. Because the ASF only pertains to establishing or reorganizing a general-purpose zone, the application would have no impact on FTZ 177's authorized subzones.

In accordance with the Board's regulations, Claudia Hausler of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is July 6, 2010. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to July 19, 2010.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002, and in the "Reading Room" section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.* For further information, contact Claudia Hausler at

Claudia.Hausler@trade.gov or (202)482–1379.

Dated: April 23, 2010.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–10615 Filed 5–4–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 30–2010]

Foreign-Trade Zone 5—Seattle, WA; Application for Reorganization/ Expansion Under Alternative Site Framework

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Port of Seattle, grantee of FTZ 5, requesting authority to reorganize and expand the zone under the alternative site framework (ASF) adopted by the Board (74 FR 1170, 1/12/09; correction 74 FR 3987, 1/22/09). The ASF is an option for grantees for the establishment or reorganization of general-purpose zones and can permit significantly greater flexibility in the designation of new "usage-driven" FTZ sites for operators/users located within a grantee's "service area" in the context of the Board's standard 2,000-acre activation limit for a general-purpose zone project. The application was submitted pursuant to the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on April 29, 2010.

FTZ 5 was approved by the Board on June 27, 1949 (Board Order 19, 14 FR 3686, 07/02/49) and had the boundaries modified on January 19, 1953 (Board Order 31, 18 FR 556, 01/24/53). FTZ 5 was relocated on February 27, 1959 (Board Order 48, 24 FR 1686, 03/06/59), on August 14, 1964 (Board Order 63, 29 FR 11987, 08/21/64), and on August 25, 1976 (Board Order 111, 41 FR 36847, 09/01/76). FTZ 5 was expanded on September 25, 1989 (Board Order 432, 54 FR 40154, 09/29/89).

The current zone project includes the following sites: *Site 1* (955 acres)—Port of Seattle Seaport, 2711 Alaskan Way, Seattle; *Site 2* (436.68 acres)—Seattle/Tacoma International Airport, 17801 International Boulevard, Seattle; *Site 3* (0.45 acres)—9875 40th Avenue South, Seattle, and *Site 4* (2.75 acres)—20607 59th Place South, Kent.

The grantee's proposed service area under the ASF would be the Washington counties of King and Snohomish (dependent on case-by-case concurrence from the Port of Everett for the latter county), as described in the application. If approved, the grantee would be able to serve sites throughout the service area based on companies' needs for FTZ designation. The proposed service area is within and adjacent to the Puget Sound Customs and Border Protection port of entry.

The applicant is requesting authority to reorganize its existing zone project to include existing sites 1, 2 and 4 as "magnet" sites and existing Site 3 as a "usage-driven" site. The ASF allows for the possible exemption of one magnet site from the "sunset" time limits that generally apply to sites under the ASF, and the applicant proposes that Site 1 be so exempted. The applicant is also requesting approval of the following initial "usage-driven" site: *Proposed Site 5* (3.84 acres)—Wilson Sporting Goods/Precor Incorporated, 6617 Associated Boulevard, Everett, WA.

In accordance with the Board's regulations, Christopher Kemp of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is July 6, 2010. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to July 19, 2010.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC 20230–0002, and in the "Reading Room" section of the Board's Web site, which is accessible via *http://www.trade.gov/ftz.* For further information, contact Christopher Kemp at *Christopher.Kemp@trade.gov* or (202) 482–0862.

Dated: April 29, 2010.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–10612 Filed 5–4–10; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Order No. 1677]

Designation of New Grantee

Foreign–Trade Zone 185, Culpeper, Virginia

Resolution and Order

Pursuant to its authority under the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign–Trade Zones Board (the Board) adopts the following Order:

The Foreign–Trade Zones Board (FTZ) Board (the Board) has considered the application (filed 12/01/09) submitted by the Culpeper County Chamber of Commerce, grantee of FTZ 185, requesting reissuance of the grant of authority for said zone to the County of Culpeper, a public corporation, which has accepted such reissuance subject to approval by the FTZ Board. Upon review, the Board finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest.

Therefore, the Board approves the application and recognizes the County of Culpeper as the new grantee of Foreign–Trade Zone 185, subject to the FTZ Act and the Board's regulations, including Section 400.28. The Secretary of Commerce, as Chairman of the Board, is hereby authorized to issue an appropriate Board Order.

Signed at Washington, DC, this 20th day of April 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary of Commerce for Import Administration Alternate Chairman Foreign–Trade Zones Board.

ATTEST:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–10617 Filed 5–4–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Order No. 1676]

Designation of New Grantee

Foreign–Trade Zone 243, Victorville, California

Resolution and Order

Pursuant to its authority under the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign–

Trade Zones Board (the Board) adopts the following Order:

The Foreign–Trade Zones (FTZ) Board (the Board) has considered the application (filed 03/17/2010) submitted by the Southern California Logistics Airport Authority, grantee of FTZ 243, requesting reissuance of the grant of authority for said zone to the City of Victorville, which has accepted such reissuance subject to approval by the FTZ Board. Upon review, the Board finds that the requirements of the FTZ Act and the Board's regulations are satisfied, and that the proposal is in the public interest.

Therefore, the Board approves the application and recognizes the City of Victorville as the new grantee of Foreign–Trade Zone 243, subject to the FTZ Act and the Board's regulations, including Section 400.28. The Secretary of Commerce, as Chairman of the Board, is hereby authorized to issue an appropriate Board Order.

Signed at Washington, DC, this 20th day of April 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import AdministrationAlternate ChairmanForeign–Trade Zones Board.

ATTEST:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–10621 Filed 5–4–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Docket 28–2010]

Foreign–Trade Zone 29 - Louisville, Kentucky, Application for Subzone, Louisville Bedding Company (Household Bedding Products), Louisville and Munfordville, Kentucky

An application has been submitted to the Foreign–Trade Zones Board (the Board) by the Louisville & Jefferson County Riverport Authority, grantee of FTZ 29, requesting special–purpose subzone status for the bedding products manufacturing facilities of Louisville Bedding Company (LBC) located in Louisville and Munfordville, Kentucky. The application was submitted pursuant to the provisions of the Foreign–Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally filed on April 26, 2010.

The LBC facilities (530 employees) consist of three sites: *Site 1* - manufacturing plant and warehouse (26.1 acres) located at 10400 Bunsen Way, Louisville; *Site 2* - warehouse (4.3 acres) located at 100 Quality Street, Munfordville; and, *Site 3* - manufacturing plant and warehouse (27.7 acres) located at 660 National Turnpike, Munfordville, Kentucky. The facilities are used to manufacture household bedding products, including mattress pads and pillows (up to 10 million pillows and 10 million mattress pads annually) for the U.S. market and export. LBC is requesting authority to utilize foreign–origin wide roll (80 inches and wider), high thread count (180 threads per inch and higher) cotton, polyester, and synthetic woven fabric and pillow shells (classified under HTSUS Headings 5208, 5210, 5512, 5513, and 6307; duty rate range: 7 - 14.9%) to be cut, sewn, quilted and assembled into the bedding products noted above under FTZ procedures.

FTZ procedures could exempt LBC from customs duty payments on the foreign–origin fabrics and pillow shells used in export production. On its shipments for the domestic market, the finished household bedding products would be entered for consumption from the proposed subzone classified under HTSUS 9404.90, and LBC is seeking authority to elect the various finished bedding product duty rates (4.4 - 7.3%, *ad valorem*) for the foreign–origin fabric and pillow shell material inputs. Domestic–status fibers would be used to fill the foreign pillow shells. The application indicates that the savings from FTZ procedures would help improve the facilities' international competitiveness.

In accordance with the Board's regulations, Pierre Duy of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case record and to report findings and recommendations to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the following address: Office of the Executive Secretary, Room 2111, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Washington, DC 20230–0002. The closing period for receipt of comments is July 6, 2010. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to July 19, 2010.

A copy of the application will be available for public inspection at the Office of the Foreign–Trade Zones Board's Executive Secretary at the address listed above and in the "Reading Room" section of the Board's website, which is accessible via www.trade.gov/ftz. For further information, contact Pierre Duy at Pierre.Duy@trade.gov or (202) 482–1378.

Dated: April 26, 2010.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–10614 Filed 5–4–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–962]

Certain Potassium Phosphate Salts from the People's Republic of China: Preliminary Affirmative Determination of Critical Circumstances in the Antidumping Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* May 5, 2010.

FOR FURTHER INFORMATION CONTACT: Irene Gorelik at (202) 482–6905, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230.

Background

On March 16, 2010, the Department of Commerce ("Department") published its preliminary determination in the antidumping duty investigation of certain potassium phosphate salts ("salts") from the People's Republic of China ("PRC"). *See Certain Potassium Phosphate Salts From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value,* 75 FR 12508 (March 16, 2010) ("*Preliminary Determination*").

On April 2, 2010, Petitioners [1] filed a timely critical circumstances allegation, pursuant to 19 CFR 351.206, alleging that critical circumstances exist with respect to imports of the merchandise under consideration.

In accordance with 19 CFR 351.206(c)(1), when a critical circumstances allegation is filed 30 days or more before the scheduled date of the final determination (as was done in this case), the Department will issue a preliminary finding whether there is a reasonable basis to believe or suspect that critical circumstances exist. Because the critical circumstances allegation in this case was submitted after the preliminary determination was published, the Department must issue

[1] ICL Performance Products LP and Prayon, Inc.

our preliminary findings of critical circumstances not later than 30 days after the allegation was filed. *See* 19 CFR 351.206(c)(2)(ii).

Legal Framework

Section 733(e)(1) of the Tariff Act of 1930, as amended ("Act"), provides that the Department, upon receipt of a timely allegation of critical circumstances, will determine whether there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales, and; (B) there have been massive imports of the subject merchandise over a relatively short period.

Further, 19 CFR 351.206(h)(1) provides that, in determining whether imports of the subject merchandise have been "massive," the Department normally will examine: (i) The volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. In addition, 19 CFR 351.206(h)(2) provides that, "{i}n general, unless the imports during the 'relatively short period' * * * have increased by at least 15 percent over the imports during an immediately preceding period of comparable duration, the Secretary will not consider the imports massive." 19 CFR 351.206(i) defines "relatively short period" generally as the period starting on the date the proceeding begins (*i.e.,* the date the petition is filed) and ending at least three months later. This section of the regulations further provides that, if the Department "finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely," then the Department may consider a period of not less than three months from that earlier time.

Allegation

In their allegation, Petitioners contend that, based on the dumping margins assigned by the Department in the *Preliminary Determination,* importers knew or should have known that the merchandise under consideration was being sold at less than fair value ("LTFV"). Petitioners also contend that, based on the preliminary determination of injury by the U.S. International Trade Commission ("ITC"), there is a reasonable basis to impute importers' knowledge that material injury is likely by reason of such imports. In their allegation, Petitioners included import statistics for the three different "like products" covered by the scope of this investigation for the period between June 2009 and January 2010. *See* Petitioners' Allegation, dated April 2, 2010, at 10–11.

Analysis

The Department's normal practice in determining whether critical circumstances exist pursuant to the statutory criteria has been to examine evidence available to the Department, such as: (1) The evidence presented in Petitioners' critical circumstances allegation; (2) import statistics released by the ITC, and (3) shipment information submitted to the Department by the respondents selected for individual examination.[2] Here, in determining whether the above statutory criteria have been satisfied in this case, we examined: (1) The evidence presented in Petitioners' April 2, 2010, allegation; and (2) evidence obtained since the initiation of this investigation, and (3) the ITC's preliminary injury determination.

Section 733(e)(1)(A)(i) of the Act: History of Dumping and Material Injury by Reason of Dumped Imports in the United States or Elsewhere of the Subject Merchandise

In determining whether a history of dumping and material injury exists, the Department generally has considered current or previous antidumping duty orders on subject merchandise from the country in question in the United States and current orders in any other country. *Id.* In this case, the Department is not aware of any antidumping duty order on subject merchandise from the PRC in any country. Therefore, the Department finds no history of injurious dumping of subject merchandise from the PRC pursuant to section 733(e)(1)(A)(i) of the Act.

Section 733(e)(1)(A)(ii): The Importer Knew or Should Have Known That Exporter Was Selling at Less Than Fair Value and That There Was Likely To Be Material Injury

In determining whether an importer knew or should have known that the exporter was selling subject merchandise at LTFV and that there was likely to be material injury by reason of such sales, the Department must rely on the facts before it at the time the determination is made. The Department generally bases its decision with respect to knowledge on the margins calculated in the preliminary determination and the ITC's preliminary injury determination.

The Department normally considers margins of 25 percent or more for export price sales and 15 percent or more for constructed export price sales sufficient to impute importer knowledge of sales at LTFV.[3] The Department preliminarily determined margins of 69.58 percent for the non-selected separate-rate applicants and 95.40 percent for the PRC-wide entity, which includes the mandatory respondents. Therefore, as we preliminarily determined margins greater than 25 percent for all producers and exporters, we preliminarily find, with respect to all producers and exporters, that there is a reasonable basis to believe or suspect that importers knew, or should have known, that exporters were selling subject merchandise at LTFV.

In determining whether an importer knew or should have known that there was likely to be material injury caused by reason of such imports, the Department normally will look to the preliminary injury determination of the ITC. If the ITC finds a reasonable indication of present material injury to the relevant U.S. industry, the Department will determine that a reasonable basis exists to impute importer knowledge that material injury is likely by reason of such imports.[4] Here, the ITC found that that "there is a reasonable indication that an industry producing monopotassium phosphate

[2] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China,* 73 FR 31970 (June 5, 2008) ("*Carbon Steel Pipe*"); *Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances: Small Diameter Graphite Electrodes from the People's Republic of China,* 74 FR 2049 January 14, 2009) ("*SDGE*").

[3] *See, e.g., Carbon and Alloy Steel Wire Rod From Germany, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Preliminary Determination of Critical Circumstances,* 67 FR 6224, 6225 (February 11, 2002); *Affirmative Preliminary Determination of Critical Circumstances: Magnesium Metal from the People's Republic of China,* 70 FR 5606 (February 3, 2005).

[4] *See, e.g., Carbon and Alloy Steel Wire Rod From Germany, Mexico, Moldova, Trinidad and Tobago, and Ukraine: Preliminary Determination of Critical Circumstances,* 67 FR 6224, 6225 (February 11, 2002); *Affirmative Preliminary Determination of Critical Circumstances: Magnesium Metal from the People's Republic of China,* 70 FR 5606 (February 3, 2005).

("MKP"), is materially injured or threatened with material injury." [5] The ITC also found that "there is a reasonable indication that industries producing dipotassium phosphate ('DKP') and tetrapotassium pyrophosphate ('TKPP'), are threatened with material injury." *Id.* Where the ITC finds threat of material injury, the Department also considers such factors as: (1) The extent of the increase in the volume of imports of the subject merchandise during the critical circumstances period and (2) the magnitude of the dumping margins in determining whether a reasonable basis exists to impute knowledge that material injury was likely.[6] In this case, import volume data from ITC's Dataweb shows an increase of 86.1 percent in salts imports from the PRC during the comparison period, more than five times the increase needed to find massive imports. *See* Petitioners' Allegation at 10. Furthermore, the preliminary dumping margins are significantly greater than 25 percent. Therefore, the Department preliminarily finds that there is a reasonable basis to believe or suspect that importers knew or should have known that there was likely to be material injury by reason of sales at LTFV of subject merchandise from the PRC.

Section 733(e)(1)(B): Whether There Have Been Massive Imports of the Subject Merchandise Over a Relatively Short Period

Pursuant to 19 CFR 351.206(h)(2), the Department will not consider imports to be massive unless imports in the comparison period have increased by at least 15 percent over imports in the base period. The Department normally considers a "relatively short period" as the period beginning on the date the proceeding begins and ending at least three months later. *See* 19 CFR 351.206(i). For this reason, the Department normally compares the import volumes of the subject merchandise for at least three months immediately preceding the filing of the petition (*i.e.,* the "base period") to a comparable period of at least three months following the filing of the petition (*i.e.,* the "comparison period").

In their April 2, 2010, allegation, Petitioners maintained that importers, exporters, or foreign producers gained knowledge that this proceeding was possible when the petition for an antidumping duty investigation was filed on September 24, 2009. *See* Petitioners' April 2, 2010, submission at 5–9. Moreover, Petitioners noted that when a petition is filed in the second half of a month, the month following the filing is treated as part of the post-petition period. Petitioners also included in their allegation U.S. import data collected from the ITC's Dataweb. Based on this data, Petitioners provided data for a four-month base period (June 2009 through September 2009) and a four-month comparison period (October 2009 through January 2010) in showing whether imports were massive.

Based on the date of the filing of the petition, *i.e.,* September 24, 2009, which is in the second half of the month, the Department agrees with Petitioners that October 2009 is the month in which importers, exporters, or producers knew or should have known an antidumping duty investigation was likely, and falls within the comparison period. According to 19 CFR 351.206(i), the base and comparison periods normally should be at least three months.

Adverse Facts Available ("AFA")

In this investigation, the Department selected SD BNI(LYG) Co. Ltd. ("SD BNI") and Sichuan Blue Sword Import & Export Co., Ltd. ("Sichuan Blue Sword") as mandatory respondents in this investigation.[7] In the *Preliminary Determination,* the Department determined that there were exporters/producers of the merchandise under investigation during the POI from the PRC that did not respond to the Department's request for information, including Sichuan Blue Sword, one of the mandatory respondents. Therefore, we treated these PRC exporters/producers, including Sichuan Blue Sword, as part of the PRC-wide entity because they did not qualify for a separate rate. *See Preliminary Determination* at 75 FR 12508, 12512. Further, information on the record indicates that the PRC-wide entity was non-cooperative because certain companies did not respond to our requests for information. *Id.* As a result, pursuant to section 776(a)(2)(A) and 776(b) of the Act, we preliminarily found that the use of AFA was warranted to determine the PRC-wide rate. *Id.* As AFA, we preliminarily assigned to the PRC-wide entity a rate of 95.40 percent, which is the highest margin alleged in the Petition. *Id.*

Furthermore, pursuant to sections 776(a)(2)(A), (B), and (C) and 776(b) of the Act, we preliminarily applied AFA to SD BNI, the other mandatory respondent, because we found that the information necessary to calculate an accurate and otherwise reliable margin is not available on the record with respect to SD BNI. We preliminarily found that SD BNI failed to provide the information requested by the Department in a timely manner and in the form required, and significantly impeded the Department's ability to calculate an accurate margin for SD BNI. The Department was unable to calculate a margin without the necessary information, requiring the application of facts otherwise available to SD BNI for the purpose of the *Preliminary Determination. Id.* at 12513 Therefore, because SD BNI was selected as a mandatory respondent and failed to submit the information required, SD BNI did not receive a separate rate and remains part of the PRC-wide entity. *Id.*

PRC–Wide Entity

Because the PRC-wide entity did not respond to the Department's antidumping questionnaire, we did not obtain shipment data from the PRC-wide entity for purposes of our critical circumstances analysis and therefore there is no verifiable information on the record with respect to its export volumes. Section 776(a)(2) of the Act provides that, if an interested party or any other person (A) withholds information that has been requested by the administering authority or the Commission under this title, (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782, (C) significantly impedes a proceeding under this title, or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority and the Commission shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.

Furthermore, section 776(b) of the Act provides that, if a party has failed to act to the best of its ability, the Department

[5] *See Investigation Nos. 701–TA–473 and 731–TA–1173 (Preliminary) Certain Sodium and Potassium Phosphate Salts From China,* 74 FR 61173 (November 23, 2009) ("*ITC Prelim*").

[6] *See, e.g., Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam,* 68 FR 37116 (June 23, 2003); *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan,* 64 FR 24329 (May 6, 1999) at Comment 2 (where the Department considered other sources of information, including press reports regarding rising imports, falling domestic prices resulting from rising imports and domestic buyers shifting to foreign suppliers).

[7] *See* "Memorandum to James C. Doyle, Director, Office IX, from Katie Marksberry, Case Analyst, through Catherine Bertrand, Program Manager, Office IX; regarding Antidumping Duty Investigation of Certain Potassium Phosphate Salts from the People's Republic of China," dated November 13, 2009.

may apply an adverse inference. The PRC-wide entity did not respond to the Department's request for information. Thus, we are using facts available, in accordance with section 776(a) of the Act, and, pursuant to section 776(b) of the Act, we also find that AFA is warranted so that the PRC-wide entity does not obtain a more favorable result by failing to cooperate than if it had fully cooperated. Accordingly, we preliminarily find that there were massive imports of merchandise from the PRC-wide entity.

Further, in some cases the Department has also considered the import volume from the ITC Dataweb as further evidence supporting an affirmative determination of critical circumstances based on AFA.[8] Here, we find that the ITC Dataweb import statistics further support the Department's determination that the volume of imports of subject merchandise in the post-petition period are consistent with an AFA finding that these imports were massive.

Separate-Rate Applicants

Because it has been the Department's practice to conduct its massive imports analysis of separate rate companies [9] based on the experience of investigated companies, we did not request monthly shipment information from the three separate-rate applicants. However, where mandatory respondents have received AFA, we have not imputed those adverse inferences of massive imports to the non-individually examined companies receiving a separate rate. Instead, the Department has relied upon the ITC Dataweb import statistics where appropriate in determining whether there have been massive imports for the separate-rate companies. Accordingly, as the basis for determining whether imports were massive for these separate-rate companies, we are relying on ITC Dataweb import statistics as evidence that imports in the post-petition period were massive for those companies. As stated above, in this case, import volume data shows an increase of 86.1 percent of salts imports from the PRC during the comparison period. *See* Petitioners' Allegation at 10. Thus, pursuant to section 351.206(h) of the Department's regulations, we determine that this increase, being greater than 15 percent, shows that imports in the comparison period were massive for the separate-rate companies.

Critical Circumstances

Record evidence indicates that importers of salts knew, or should have known, that exporters were selling the merchandise at LTFV, and that there was likely to be material injury by reason of such sales. In addition, record evidence indicates that the PRC-wide entity and the separate-rate applicants had massive imports during a relatively short period. Therefore, in accordance with section 733(e)(1) of the Act, we preliminarily find that there is reason to believe or suspect that critical circumstances exist for imports of subject merchandise from the PRC-wide entity (which includes SD BNI and Sichuan Blue Sword) and the separate-rate companies (Snow-Apple Group Limited, Tianjin Chengyi International Trading (Tianjin) Co., Limited, Wenda Co., Ltd., and Yunnan Newswift Company Ltd.) in this antidumping duty investigation. *See* section 733(f) of the Act and 19 CFR 351.206(c)(2)(ii).

Suspension of Liquidation

In accordance with section 703(e)(2)(A) of the Act, we are directing CBP to suspend liquidation of any unliquidated entries of subject merchandise from the PRC entered, or withdrawn from warehouse for consumption, on or after December 16, 2009, which is 90 days prior to the date of publication of the *Preliminary Determination* in the **Federal Register.**

ITC Notification

In accordance with section 733(f) of the Act, we have notified the ITC of our preliminary determination.

Public Comment

Since this determination is being made subsequent to the due dates for public comment as published in our notice of preliminary determination of sales at LTFV, we will accept written comments limited to this preliminary determination of critical circumstances if they are submitted to the Assistant Secretary for Import Administration no later than five days after the publication of this notice.

This determination is published pursuant to section 733(f) of the Act and 19 CFR 351.206(c)(2)(ii).

Dated: April 29, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–10583 Filed 5–4–10; 8:45 am]

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[8] *See, e.g., Preliminary Determination of Critical Circumstances: Certain Small Diameter Carbon and Alloy Seamless Standard Pipe and Pressure Pipe from the Czech Republic,* 65 FR 33803 (May 25, 2000) and *Notice of Final Determination of Sales at Less Than Fair Value: Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from the Czech Republic,* 65 FR 39363 (June 26, 2000) and accompanying Issues and Decision Memorandum.

[9] *See, e.g., Carbon Steel Pipe* and *SDGE.*

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–963]

Certain Potassium Phosphate Salts from the People's Republic of China: Preliminary Affirmative Determination of Critical Circumstances in the Countervailing Duty Investigation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce ("the Department") has preliminarily determined that critical circumstances exist with respect to imports of certain potassium phosphate salts ("phosphate salts" or "subject merchandise") from the People's Republic of China ("PRC").

DATES: *Effective Date:* May 5, 2010

FOR FURTHER INFORMATION CONTACT: Andrew Huston or Gene Calvert, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4261 and (202) 482–3586, respectively.

SUPPLEMENTARY INFORMATION:

Background

This investigation was initiated on October 14, 2009. *See Certain Sodium and Potassium Phosphate Salts From the People's Republic of China: Initiation of Countervailing Duty Investigation,* 74 FR 54778 (October 23, 2009). The products covered by this investigation and the title of this investigation were modified from "Certain Sodium and Potassium Phosphate Salts from the People's Republic of China" to "Certain Potassium Phosphate Salts from the People's Republic of China" as a result of the U.S. International Trade Commission's ("ITC") preliminary determination of no material injury or threat of material injury with regard to imports of sodium tripolyphosphate from the PRC. *See Certain Potassium Phosphate Salts from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination,* 75 FR 10466 (March 8, 2010) (*Preliminary Determination*), at the section "Case History." As mandatory company respondents in this investigation, the Department selected Lianyungang Mupro Import Export Co., Ltd. ("Mupro"); Mianyang Aostar Phosphate Chemical Industry Co., Ltd.

("Aostar"); and Shifang Anda Chemicals Co., Ltd. ("Anda") (collectively, "the mandatory company respondents"). On December 4, 2009, the Department issued countervailing duty ("CVD") investigation questionnaires to the Government of the People's Republic of China ("GOC") and to the mandatory company respondents. Neither the GOC nor the three mandatory company respondents submitted any responses to the Department's questionnaires. As such, our preliminary determination was based on the application of adverse facts available ("AFA") in accordance with sections 776(a) and (b) of the Tariff Act of 1930, as amended ("the Act"). *See Preliminary Determination.*

On April 6, 2010, ICL Performance Products LP and Prayon, Inc. (collectively, "Petitioners"), alleged that critical circumstances exist with respect to imports of certain potassium phosphate salts from the PRC. *See* Petitioners' April 6, 2010 submission ("Allegation of Critical Circumstances"). In accordance with 19 CFR 351.206(c)(2)(ii), when a critical circumstances allegation is filed later than 20 days before the scheduled date of the preliminary determination (as was done in this case), the Department must issue its preliminary determination of critical circumstances not later than 30 days after the petitioner submits the allegation.

Period of Investigation

The period covered by this investigation (*i.e.,* "the POI") is calendar year 2008 (January 1, 2008 through December 31, 2008).

Scope of the Investigation

The phosphate salts covered by this investigation include anhydrous Monopotassium Phosphate (MKP), anhydrous Dipotassium Phosphate (DKP) and Tetrapotassium Pyrophosphate (TKPP), whether anhydrous or in solution (collectively "phosphate salts").

TKPP, also known as normal potassium pyrophosphate, diphosphoric acid or tetrapotassium salt, is a potassium salt with the formula $K_4P_2O_7$. The CAS registry number for TKPP is 7320–34–5. TKPP is typically 18.7% phosphorus and 47.3% potassium. It is generally greater than or equal to 43.0% P_2O_5 content. TKPP is classified under heading 2835.39.1000, Harmonized Tariff Schedule of the United States ("HTSUS").

MKP, also known as potassium dihydrogen phosphate, KDP, or monobasic potassium phosphate, is a potassium salt with the formula KH_2PO_4. The CAS registry number for MKP is 7778–77–0. MKP is typically 22.7% phosphorus, 28.7% potassium and 52% P_2O_5. MKP is classified under heading 2835.24.0000, HTSUS.

DKP, also known as dipotassium salt, dipotassium hydrogen orthophosphate or potassium phosphate, dibasic, has a chemical formula of K_2HPO_4. The CAS registry number for DKP is 7758–11–4. DKP is typically 17.8% phosphorus, 44.8% potassium and 40% P_2O_5 content. DKP is classified under heading 2835.24.0000, HTSUS.

The products covered by this investigation include the foregoing phosphate salts in all grades, whether food grade or technical grade. The products covered by this investigation include anhydrous MKP and DKP without regard to the physical form, whether crushed, granule, powder or fines. Also covered are all forms of TKPP, whether crushed, granule, powder, fines or solution.

For purposes of the investigation, the narrative description is dispositive, not the tariff heading, American Chemical Society, CAS registry number or CAS name, or the specific percentage chemical composition identified above.

Allegation of Critical Circumstances

In their Allegation of Critical Circumstances, Petitioners contend that there have been massive imports over a relatively short period of certain potassium phosphate salts from the PRC since the filing of the petition. Petitioners have provided import statistics released by the U.S. International Trade Commission ("ITC") and shipment information for the merchandise under investigation. *See* Allegation of Critical Circumstances, at 6–7. Petitioners argue that these data demonstrate that imports of subject merchandise from the PRC have increased more than the fifteen percent required to be considered "massive" under 19 CFR 351.206(h)(2).

In addition, Petitioners allege that the phosphate salts industry in the PRC has benefitted from subsidies that are inconsistent with the World Trade Organization's Agreement on Subsidies and Countervailing Measures ("Subsidies Agreement"). *See* Allegation of Critical Circumstances at 2–3.[1]

[1] Specifically, Petitioners cite export subsidies and import substitution subsidies which the Department preliminarily determined to be countervailable in the instant investigation, such as Income Tax Exemption Programs for Export Oriented Industries; Income Tax Credit on Purchases of Domestically Produced Equipment; Value Added Tax Refund for FIEs Purchasing Domestically Produced Equipment; and Discount Loans for Export Oriented Industries. *See Preliminary Determination,* 75 FR at 10469.

In accordance with 19 CFR 351.206(c)(2)(ii), because the petitioners submitted a critical circumstances allegation later than 20 days before the scheduled date of the preliminary determination, the Department must issue a preliminary critical circumstances determination within 30 days after the petitioner submits the allegation. *See, e.g., Change in Policy Regarding Timing of Issuance of Critical Circumstances Determinations,* 63 FR 55364 (October 15, 1998). *Critical Circumstances Analysis*

Section 703(e)(1) of the Act provides that the Department will preliminarily determine that critical circumstances exist if there is a reasonable basis to believe or suspect that: (A) The alleged countervailable subsidy is inconsistent with the Subsidies Agreement, and (B) there have been massive imports of the subject merchandise over a relatively short period.

In determining whether an alleged countervailable subsidy is inconsistent with the Subsidies Agreement, the Department limits its critical circumstances findings to those subsidies contingent upon export performance or use of domestic over imported goods (*i.e.,* those prohibited under Article 3 of the Subsidies Agreement). *See, e.g., Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination Carbon and Certain Alloy Steel Wire Rod from Germany,* 67 FR 55808, 55809 (August 30, 2002).

Section 351.206(h)(1) of the Department's regulations provides that, in determining whether imports of the subject merchandise have been "massive," the Department normally will examine: (i) The volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. In addition, the Department will not consider imports to be massive unless imports during the "relatively short period" ("comparison period") have increased by at least fifteen percent compared to imports during an "immediately preceding period of comparable duration" ("base period"). *See* 19 CFR 351.206(h)(2).

Section 351.206(i) of the Department's regulations defines "relatively short period" as normally being the period beginning on the date the proceeding commences (*i.e.,* the date the petition is filed) and ending at least three months later. However, if the Department finds that importers, exporters, or producers had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, then the Department may consider a period of

not less than three months from that earlier time. *See* 19 CFR 351.206(i).

Application of Facts Available to the Critical Circumstances Analysis for the Mandatory Company Respondents

Sections 776(a)(1) and (2) of the Act provide that the Department shall apply "facts otherwise available" if, *inter alia,* necessary information is not on the record or an interested party or any other person: (A) Withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act. In the instant case, as referenced above, the GOC did not respond to the Department's November 10, 2009 CVD investigation questionnaire, and the three mandatory respondent companies, Mupro, Aostar, and Anda, did not respond to the Department's December 4, 2009 CVD investigation questionnaire. Because the GOC and the mandatory company respondents have decided to not participate in this investigation, we have made this preliminary determination with respect to critical circumstances on facts otherwise available, pursuant to section 776(a)(2)(C) of the Act.

Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. Section 776(b) of the Act also authorizes the Department to use as adverse facts available information derived from the petition, the final determination, a previous administrative review, or other information placed on the record. Because the GOC and the mandatory company respondents chose not to respond to the Department's CVD investigation questionnaire, we have determined that the GOC and the mandatory company respondents did not cooperate to the best of their ability in this investigation and that, in selecting from among the facts available, with respect to critical circumstances, an adverse inference is warranted, pursuant to section 776(b) of the Act. As such, we are making an adverse inference that Mupro, Aostar, and Anda each benefitted from import substitution and export subsidies, which are inconsistent with the Subsidies Agreement, and that these companies have had "massive imports" over a "relatively short period." Given the nature of these allegations, and the lack of cooperation from the GOC and the mandatory company respondents, we preliminarily determine that critical circumstances exist for Mupro, Aostar, and Anda, pursuant to sections 703(e) and 776(a) and (b) of the Act, and 19 CFR 351.206(c)(2)(ii).

Critical Circumstances Analyses for All Other Producers/Exporters

To determine whether all other PRC producers/exporters of the subject merchandise under investigation have benefitted from countervailable subsidies that are inconsistent with the Subsidies Agreement, we are basing our finding on the decision applied to Mupro, Aostar, and Anda, and, therefore, find that all other producers/exporters have benefitted from import substitution and export subsidies. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Glycine from Japan,* 72 FR 67271, 67274 (November 28, 2007) (*Glycine from Japan*). In the *Preliminary Determination,* the subsidies determined to be countervailable included subsidy programs that are inconsistent with the Subsidies Agreement, such as export subsidy programs (*e.g.,* Income Tax Exemption Programs for Export Oriented Industries and Discount Loans for Export Oriented Industries), and import substitution subsidy programs (*e.g.,* Income Tax Credit on Purchases of Domestically Produced Equipment and Refund for FIEs Purchasing Domestically Produced Equipment). *See Preliminary Determination,* 75 FR at 10469.

To determine whether there are "massive imports" over a "relatively short period," for all other producers/exporters, we have relied on U.S. import statistics. In their Allegation of Critical Circumstances, Petitioners have provided ITC monthly import statistics for the merchandise under investigation for the period June 2009 through January 2010. Consistent with *Glycine from Japan,* we are using the ITC monthly import statistics to determine whether there are "massive imports" with respect to all other producers/exporters. Based on our analyses of these import data, we preliminarily find that imports of subject merchandise from the PRC did increase by more than fifteen percent during the "relatively short period" (*i.e.,* between June 2009 through September 2009, and October 2009 through January 2010). Therefore, we preliminarily determine that the requirements of section 703(e)(1)(B) of the Act have been satisfied, and that critical circumstances exist for all other PRC producers/exporters of subject merchandise.

Conclusion

Given the analysis above, we preliminarily determine that critical circumstances exist for imports of certain potassium phosphate salts from the PRC, pursuant to section 703(e)(1) of the Act. We will make our final determination concerning critical circumstances for imports of certain potassium salts from the PRC when we make our final countervailing duty determination, currently scheduled for no later than May 24, 2010.

Suspension of Liquidation

In accordance with section 703(e)(2)(A) of the Act, we are directing CBP to suspend liquidation of any unliquidated entries of subject merchandise from the PRC entered, or withdrawn from warehouse for consumption, on or after December 8, 2009, which is 90 days prior to the date of publication of the *Preliminary Determination* in the **Federal Register.**

International Trade Commission Notification

In accordance with section 703(f) of the Act, we will notify the ITC of this preliminary determination.

Public Comment

Because this preliminary determination is being made subsequent to the deadline for public comment as set forth in the *Preliminary Determination,* we will accept written comments limited to this preliminary determination of critical circumstances if they are submitted to the Assistant Secretary for Import Administration no later than five days after the publication of this notice in accordance with the filing requirements set forth in 19 CFR 351.303.

This preliminary determination is issued and published pursuant to sections 703(f) and 777(i) of the Act.

Dated: April 29, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–10302 Filed 5–4–10; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–831]

Fresh Garlic from the People's Republic of China: Preliminary Results of New Shipper Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Department) is conducting a new shipper review (NSR) of Qingdao Sea–line International Trade Co. Ltd. (Qingdao Sea–line) under the antidumping duty order on fresh garlic from the People's Republic of China (PRC) covering the period of review (POR) of November 1, 2008 through April 30, 2009. As discussed below, we preliminarily determine that Qingdao Sea–line has made sales in the United States at prices below normal value (NV). Qingdao Sea–line has participated fully in the review and has demonstrated its eligibility for a separate rate in this NSR. The dumping margin is set forth in the "Preliminary Results of the Review" section below. If these preliminary results are adopted in our final results of review, we will instruct U.S. Customs and Border Protection (CBP) to assess antidumping duties on entries of subject merchandise during the POR for which importer–specific assessment rates are above *de minimis*. We invite interested parties to comment on these preliminary results. *See* "Comments" section below.

EFFECTIVE DATE: May 5, 2010.

FOR FURTHER INFORMATION CONTACT: Scott Lindsay, AD/CVD Operations, Office 6, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0780.

SUPPLEMENTARY INFORMATION:

Background

On May 21, 2009, pursuant to section 751(a)(2)(B)(i) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.214(c), the Department received a NSR request from Qingdao Sea–line. On June 24, 2009, the Department determined that the request submitted by Qingdao Sea–line met the threshold requirements for initiation of a NSR and initiated Qingdao Sea–line's NSR. *See Fresh Garlic From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review*, 74 FR 31241 (June 30, 2009).

On October 29, 2009, the Department placed a copy of the CBP data run on the record of this review, which contains all entries of subject merchandise exported from the PRC to the United States during the POR. *See* Memorandum to the File, from The Team, AD/CVD Operations, Office 6, Re: New Shipper Review of Fresh Garlic from the People's Republic of China: Customs Entries from November 1, 2008 through April 30, 2009 (October 29, 2009). On April 20, 2010, the Department placed copies of CBP documents on the record of this review pertaining to Qingdao Sea–line's shipment of garlic from the PRC exported to the United States during the POR. *See* Memorandum to the File, from Scott Lindsay, Senior Case Analyst, Re: New Shipper Review of Fresh Garlic from the People's Republic of China: Customs Entry Package (April 20, 2010).

Since the initiation of this review, the Department has issued original and supplemental questionnaires to Qingdao Sea–line, which Qingdao Sea–line has responded to in a timely manner. On October 13, 2009, the Department sent interested parties a letter requesting comments on the surrogate country selection and information pertaining to valuing factors of production. *See* Letter to Interested Parties, from the Department, Re: New Shipper Review of Fresh Garlic from the People's Republic of China ("PRC") (October 13, 2009). On November 19, 2009, the Department extended the preliminary results of this NSR to no later than April 20, 2010. *See Fresh Garlic from the People's Republic of China: Extension of Time Limit for the Preliminary Results of the New Shipper Review*, 74 FR 59962 (November 19, 2009). As explained in the memorandum from the Deputy Assistant Secretary (DAS) for Import Administration, the Department exercised its discretion to toll deadlines for the duration of the closure of the Federal Government from February 5 through February 12, 2010. Thus, all deadlines in this segment of the proceeding were extended by seven days. *See* Memorandum to the Record from Ronald Lorentzen, DAS for Import Administration, Re: Tolling of Administrative Deadlines As a Result of the Government Closure During the Recent Snowstorm (February 12, 2010). Therefore, the deadline for the preliminary results of this review was extended to April 27, 2010.

On January 15, 2010, Qingdao Sea–line submitted comments on the surrogate country selection and information pertaining to valuing factors of production. *See* Letter to the Department, from Qingdao Sea–line, Re: Fresh Garlic from the People's Republic of China Surrogate Value Information for 15th New Shipper Review (January 15, 2010) (Qingdao Sea–line's Surrogate Value Submission). The Fresh Garlic Producers Association (FGPA) and its individual members (Christopher Ranch L.L.C., the Garlic Company, Valley Garlic, and Vessey and Company, Inc.) (collectively, Petitioners) also submitted comments regarding surrogate values for this NSR. *See* Letter to the Department, from Petitioners, Re: 15th New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China (January 14, 2010) (Petitioners' Surrogate Value Data). No other party has submitted surrogate values or surrogate country comments on the record of this proceeding.

On March 26, 2010, Petitioners submitted on the record documents and data that, it maintains, call into question the U.S. price reported by Qingdao Sea–line for its garlic. On April 13, 2010, Qingdao Sea–line submitted a response to Petitioners' March 26, 2010, submission. In its response, Qingdao Sea–line argued that the U.S. sales information it placed on the record was complete, accurate, and supported by third party documentation. Therefore, Qingdao Sea–line argued, it is appropriate for the Department to utilize its reported U.S. sales information for these preliminary results. On April 16, 2010, the Department issued a supplemental questionnaire regarding the information contained in Petitioners' submission. A response to this questionnaire was received on April 22, 2010. The Department notes that this questionnaire response was received too late to be considered for this preliminary determination. The Department will therefore consider these submissions in its analysis for the final results.

Period of Review

Pursuant to 19 CFR 351.214(g), the POR covered by this NSR is November 1, 2008 through April 30, 2009.

Scope of the Order

The products covered by this order are all grades of garlic, whole or separated into constituent cloves, whether or not peeled, fresh, chilled, frozen, provisionally preserved, or packed in water or other neutral substance, but not prepared or preserved by the addition of other ingredients or heat processing. The differences between grades are based on color, size, sheathing, and level of decay. The scope of this order does not include the following: (a) garlic that has been mechanically harvested and that is primarily, but not exclusively, destined for non–fresh use; or (b) garlic that has

been specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed. The subject merchandise is used principally as a food product and for seasoning. The subject garlic is currently classifiable under subheadings 0703.20.0010, 0703.20.0020, 0703.20.0090, 0710.80.7060, 0710.80.9750, 0711.90.6000, and 2005.90.9700 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this order is dispositive. In order to be excluded from the order, garlic entered under the HTSUS subheadings listed above that is (1) mechanically harvested and primarily, but not exclusively, destined for non–fresh use or (2) specially prepared and cultivated prior to planting and then harvested and otherwise prepared for use as seed must be accompanied by declarations to CBP to that effect.

Non–Market Economy Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a non–market economy (NME) country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority. *See, e.g., Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review*, 71 FR 66304 (November 14, 2006). None of the parties to this proceeding have contested such treatment. Accordingly, we calculated NV in accordance with section 773(c) of the Act, which applies to NME countries.

Separate Rates

As noted above, designation of a country as an NME remains in effect until it is revoked by the Department. *See* section 771(18)(C)(i) of the Act. Accordingly, there is a rebuttable presumption that all companies within the PRC are subject to government control and, thus, should be assessed a single antidumping duty rate.

It is the Department's standard policy to assign all exporters of the merchandise subject to review in NME countries a single rate unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to its exports. To establish whether a company is sufficiently independent to be entitled to a separate, company–specific rate, the Department analyzes each exporting entity in an NME country under the test established in the *Final Determination of Sales at Less than Fair Value: Sparklers from the People's Republic of China (Sparklers)*, 56 FR 20588 (May 6, 1991), as amplified by the *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*).

The Department's separate–rate status test to determine whether the exporter is independent from government control does not consider, in general, macroeconomic/border–type controls (*e.g.*, export licenses, quotas, and minimum export prices), particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision–making process at the individual firm level.[1]

A. Absence of De Jure Control

The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; and (2) any legislative enactments decentralizing control of companies.

Throughout the course of this proceeding, Qingdao Sea–line has placed documentation on the record to demonstrate absence of *de jure* control including business licenses, financial statements, and narrative information regarding government laws and regulations on corporate ownership and the companies' operations and selection of management. In addition, Qingdao Sea–line has placed on the record copies of certain laws and regulations, including the "Company Law of the People's Republic of China," the "Foreign trade Law of the PRC," and "Regulations of the PRC on the Administration of Company Registration." The Department has analyzed these PRC laws and found that they establish an absence of *de jure* control. *See, e.g., Honey from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 72 FR 102, 105 (January 3, 2007), unchanged in *Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 72 FR 37715, 37716 (July 11, 2007). We have no information in this proceeding that would cause us to reconsider this determination. Thus, we determine that the evidence on the record supports a preliminary finding of an absence of de jure government control of Qingdao Sea–line based on: (1) an absence of restrictive stipulations associated with the exporter's business license; and (2) the legal authority on the record decentralizing control over the respondent.

B. Absence of De Facto Control

As stated in previous cases, there is evidence that certain enactments of the PRC central government have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. *See, e.g., Silicon Carbide*, 59 FR at 22586–87. Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether the respondents are, in fact, subject to a degree of government control which would preclude the Department from assigning separate rates.

The absence of *de facto* governmental control over exports is based on whether a company: (1) sets its own export prices independent of the government and other exporters; (2) retains the proceeds from its export sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) has the authority to negotiate and sign contracts and other agreements; and (4) has autonomy from the government regarding the selection of management. *See, e.g., Silicon Carbide*, 59 FR at 22587, and *Sparklers*, 56 FR at 20589; *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

In Qingdao Sea–line's questionnaire responses, it submitted evidence indicating an absence of *de facto* governmental control over its export activities. Specifically, this evidence indicates that: (1) Qingdao Sea–line sets its own export prices independent of the government and without the approval of a government authority; (2) Qingdao Sea–line retains the proceeds from its sales and makes independent decisions regarding the disposition of profits or financing of losses; (3) Qingdao Sea–line has an executive director and general manager with the authority to negotiate and bind the company in an agreement; (4) the general manager is selected by the owners of the company, and the

[1] *See Certain Cut-to-Length Carbon Steel Plate from Ukraine: Final Determination of Sales at Less than Fair Value*, 62 FR 61754, 61758 (November 19, 1997), and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 62 FR 61276, 61279 (November 17, 1997).

general manager appoints the manager of each department; and (5) there is no restriction on Qingdao Sea–line's use of export revenues. The questionnaire responses of Qingdao Sea–line do not suggest that pricing is coordinated among exporters. The Department conducted a separate rate analysis for Qingdao Sea–line. During our analysis of the information on the record, we found no information indicating the existence of *de facto* government control. Therefore, the Department preliminarily finds that Qingdao Sea–line has established, *prima facie*, that it qualifies for separate rate status under the criteria established by *Silicon Carbide* and *Sparklers*.

Bona Fides Analysis

Consistent with Department practice, we examined the *bona fides* of the new shipper sale at issue. In evaluating whether or not a sale in a NSR is commercially reasonable, and therefore bona fide, the Department considers, *inter alia*, such factors as: (1) the timing of the sale; (2) the price and quantity; (3) the expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was made on an arm's–length basis. *See Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States*, 366 F. Supp. 2d 1246, 1250 (Court of International Trade (CIT) 2005) (*TTPC*). Accordingly, the Department considers a number of factors in its bona fides analysis, "all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise." *See Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1342 (CIT 2005) (*New Donghua*) (citing *Fresh Garlic From the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002) and accompanying Issues and Decision Memorandum: New Shipper Review of Clipper Manufacturing Ltd.). In *TTPC*, the court also affirmed the Department's decision that "any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant," (*TTPC*, 366 F. Supp. 2d at 1250), and found that "the weight given to each factor investigated will depend on the circumstances surrounding the sale." *TTPC*, 366 F. Supp. 2d at 1263. Finally, in *New Donghua*, the CIT affirmed the Department's practice of evaluating the circumstances surrounding a NSR sale, so that a respondent does not unfairly benefit from an atypical sale and obtain a lower dumping margin than the producer's usual commercial practice would dictate.

We preliminarily find that the sale made by Qingdao Sea–line during the POR was a *bona fide* commercial transaction based on the totality of circumstances, namely: (1) the price reported by Qingdao Sea–line; (2) neither Qingdao Sea–line nor its customer incurred any extraordinary expenses arising from the transaction; (3) the sale was made between unaffiliated parties at arm's length; and (4) the timing of the sale does not indicate that this sale was not *bona fide*. However, we note that the Department will continue to examine all aspects of Qingdao Sea–line's POR sale including whether it is atypical, and, as such, not indicative of what its future sales may be. Since much of our analysis regarding the evidence of the *bona fides* of the transaction involves business proprietary information, a full discussion of the bases for our preliminary decision is set forth in the Memorandum to Barbara E. Tillman, Director Office 6, Re: Bona Fides Analysis of the Sale in the Antidumping Duty New Shipper Review of Fresh Garlic from the People's Republic of China ("PRC"): Qingdao Sea–line International Trading Co., Ltd. New Shipper Review (April 27, 2010) (*Qingdao Sea–line's Preliminary Bona Fides Memorandum*). As discussed above, we will continue to examine the *bona fides* of Qingdao Sea–line's sale.

Based on our preliminary findings that: 1) Qingdao Sea–line's sale is *bona fide*; 2) Qingdao Sea–line is eligible for a separate rate (*see* the "Separate Rates" section above); 3) Qingdao Sea–line is not affiliated with any exporter or producer that had previously shipped subject merchandise to the United States; and 4) Jinxiang County Juxinyuan Trading Co. Ltd. (Jinxiang Juxinyuan), the producer of the subject merchandise, did not export the subject merchandise to the United States during the POI, we preliminarily determine that Qingdao Sea–line has met the requirements to qualify as a new shipper during the POR. Therefore, for purposes of these preliminary results, we are treating the single sale of subject merchandise exported to the United States by Qingdao Sea–line and produced by Jinxiang Juxinyuan during the POR, to be an appropriate transaction for this review.

Surrogate Country

When the Department investigates imports from an NME country, section 773(c)(1) of the Act directs it to base Normal Value (NV) on the NME producer's factors of production (FOPs), valued in a surrogate market economy country or countries considered to be appropriate by the Department. In accordance with section 773(c)(4) of the Act, in valuing the FOPs, the Department shall utilize, to the extent possible, the prices or costs of FOPs in one or more market economy countries that are: (1) at a level of economic development comparable to that of the NME country; and (2) significant producers of comparable merchandise. Moreover, it is the Department's practice to select an appropriate surrogate country based on the availability and reliability of data from the countries. *See Department Policy Bulletin No. 04.1: Non–Market Economy Surrogate Country Selection Process* (March 1, 2004) (*Policy Bulletin*).

As discussed in the "Non–Market Economy Country Status" section above, the Department considers the PRC to be an NME country. Pursuant to section 773(c)(4) of the Act, the Department determined that India, Colombia, Indonesia, the Philippines, Peru, and Thailand are countries comparable to the PRC in terms of economic development. *See* Memorandum to Thomas Gilgunn, Program Manager, from Kelly Parkhill, Acting Director Office of Policy, Subject: Request for a List of Surrogate Countries for a New Shipper Review of the Antidumping Duty Order on Fresh Garlic from the People's Republic of China (September 15, 2009). Also in accordance with section 773(c)(4) of the Act, the Department has found that India is a significant producer of comparable merchandise. Moreover, the Department finds India to be a reliable source for surrogate values because India is at a similar level of economic development, pursuant to section 773(c)(4) of the Act, is a significant producer of comparable merchandise, and has publicly available and reliable data. Furthermore, the Department notes that India has been the primary surrogate country in past segments of this proceeding, and the only surrogate value data submitted on the record are from Indian sources. Given the above facts, the Department has selected India as the primary surrogate country for this review. The sources of the surrogate factor values are discussed under the "Normal Value" section below and in the Memorandum from Scott Lindsay, Re: Preliminary Results of the 2008–2009 New Shipper Review of Fresh Garlic from the People's Republic of China: Surrogate Values (April 27, 2010) (Surrogate Values Memorandum).

U.S. Price

In accordance with section 772(a) of the Act, we calculated the export price of Qingdao Sea–lines sale to the United States because it made its sale to an unaffiliated party before the date of importation and the use of constructed export price was not otherwise warranted. We calculated Qingdao Sea–line's export price based on its price to an unaffiliated purchaser in the United States. In accordance with section 772(c) of the Act, where appropriate, we deducted from the starting price to the unaffiliated purchaser the expenses for foreign inland freight, brokerage and handling, marine insurance, warehousing, and U.S. customs duties. For the expenses that were either provided by an NME vendor or paid for using an NME currency, we used surrogate values as appropriate. *See* the "Factor Valuations" section below for details regarding the surrogate values for movement expenses.

Normal Value

1. Methodology

Section 773(c)(1)(B) of the Act provides that the Department shall determine NV using an FOP methodology if the merchandise is exported from an NME country and the information does not permit the calculation of NV using home–market prices, third–country prices, or constructed value under section 773(a) of the Act. The Department calculates NV using each of the FOPs that a respondent consumes in the production of a unit of the subject merchandise because the presence of government controls on various aspects of NMEs renders price comparisons and the calculation of production costs invalid under the Department's normal methodologies. However, there are circumstances in which the Department will modify its standard FOP methodology, choosing to apply a surrogate value to an intermediate input instead of the individual FOPs used to produce that intermediate input. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the People's Republic of China*, 68 FR 47538 (August 11, 2003), and accompanying Issues and Decision Memorandum at Comment 1 (*PVA*) (citing to *Final Results of First New Shipper Review and First Antidumping Duty Administrative Review: Certain Preserved Mushrooms from the People's Republic of China*, 66 FR 31204 (June 11, 2001)).

For the final results of certain prior administrative reviews (ARs) and NSRs,[2] the Department found that garlic industry producers in the PRC do not generally track actual labor hours incurred for growing, tending, and harvesting activities and, thus, do not maintain appropriate records which would allow most, if not all, respondents to quantify, report, and substantiate this information. In the 11th AR and NSRs, the Department also stated that "should a respondent be able to provide sufficient factual evidence that it maintains the necessary information in its internal books and records that would allow us to establish the completeness and accuracy of the reported FOPs, we will revisit this issue and consider whether to use its reported FOPs in the calculation of NV." *See 11th AR and NSRs* at 71520. In the course of this review, Jinxiang Juxinyuan, Qingdao Sea–line's garlic producer, did not report FOPs related to growing whole garlic bulbs. As such, for the reasons outlined in Memorandum from Scott Lindsay, Re: 2008–2009 New Shipper Review of Fresh Garlic from the People's Republic of China: Intermediate Input Methodology (April 27, 2009) (*Intermediate Input Methodology Memorandum*), the Department is applying an "intermediate–product valuation methodology" to Qingdao Sea–line. Using this methodology, the Department calculated NV by starting with a surrogate value for the garlic bulb (*i.e.*, the "intermediate product"), adjusting for yield losses during the processing stages, and adding Jinxiang County Juxinyuan Trading Co. Ltd.'s costs, which were calculated using its reported usage rates for processing fresh garlic. *See* Intermediate Input Methodology Memorandum.

2. Factor Valuations

In accordance with section 773(c) of the Act, we calculated NV based on the FOP data reported by Jinxiang Juxinyuan for the POR. We relied on the factor–specific data submitted by Jinxiang Juxinyuan for the production inputs in its questionnaire responses, where applicable, for purposes of selecting SVs. To calculate NV, we multiplied the reported per–unit factor consumption rates by publicly–available Indian SVs.

In selecting the SVs, consistent with our past practice, we considered the quality, specificity, and contemporaneity of the data. *See, e.g., Folding Metal Tables and Chairs from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 71 FR 71509 (December 11, 2006), and accompanying Issues and Decision Memorandum at Comment 9. As appropriate, we adjusted input prices by including freight costs to make them delivered prices. Specifically, we added to Indian import SVs a surrogate freight cost using the shorter of the reported distance from the domestic supplier to the factory or the distance from the nearest seaport to the factory, where appropriate. This adjustment is in accordance with the decision of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). *See Sigma Corp. v. United States*, 117 F. 3d 1401, 1408 (Fed. Cir. 1997). Where necessary, we adjusted the SVs for inflation/deflation using the Wholesale Price Index (WPI) as published in the International Monetary Fund's International Financial Statistics, available at http://ifs.apdi.net/imf.

For more information regarding the Department's valuation for the various FOPs, *see* Surrogate Values Memorandum.

Garlic Bulb Valuation

The Department's practice when selecting the "best available information" for valuing FOPs, in accordance with section 773(c)(1) of the Act,[3] is to select, to the extent practicable, surrogate values which are publicly available, product–specific, representative of a broad market average, tax–exclusive, and contemporaneous with the POR. *See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Artist Canvas from the People's Republic of China*, 71 FR 16116 (March 30, 2006) and accompanying Issues and Decision Memorandum at Comment 2.

As discussed above, the Department is applying an intermediate input methodology for Qingdao Sea–line. Therefore, we sought to identify the best available surrogate value for the garlic bulb input for production, as opposed to finding surrogate values for the steps involved in planting, growing, and

[2] *See e.g., Fresh Garlic from the People's Republic of China: Partial Rescission and Preliminary Results of the Eleventh Administrative Review and New Shipper Reviews*, 71 FR 71510 (December 11, 2006) (unchanged in the final results); *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 12th Administrative Review*, 73 FR 34251 (June 17, 2008) ; *Fresh Garlic from the People's Republic of China: Final Results and Rescission, In Part, of Twelfth New Shipper Reviews*, 73 FR 56550 (September 29, 2008); and *Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative and New Shipper Reviews*, 74 FR 29174 (June 19, 2009).

[3] Section 773(c)(1)(B) of the Act states that . . . the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.

harvesting raw garlic (such as seeds, water, fertilizer, etc.). *See* Petitioners' Surrogate Value Data; *see also* Surrogate Values Memorandum. For the preliminary results of this review, we find that data from the Azadpur APMC's "Market Information Bulletin" are the most appropriate information available to value Qingdao Sea–line's garlic bulb input.

In its FOP database, Qingdao Sea–line reported garlic bulb input size for the garlic produced and sold to the U.S. during the POR. Consistent with our findings in *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 12th Administrative Review*, 73 FR 34251 (June 17, 2008) (*Final Results Twelfth Administrative Review*), the Department continues to find that garlic bulb sizes that range from 55 mm and above are Grade Super–A, and garlic bulb sizes that range between 40 mm and 55 mm are Grade A and Grade Super–A. *See* Surrogate Values Memorandum. Because there were no Grade Super–A prices reported by the APMC during the POR, we inflated the 2007–2008 APMC prices for "Super A" grade garlic to make them contemporaneous to our POR. *See* Surrogate Values Memorandum.

Financial Ratios

Petitioners and Qingdao Sea–line submitted comments and factual information regarding surrogate financial ratios. *See* Petitioners' Surrogate Value Data and Qingdao Sea–line's Surrogate Value Submission. After analyzing these comments and factual information, the Department has determined that it is appropriate to use Tata Tea Ltd.'s (Tata Tea) and Limtex Tea Limited's (Limtex) financial data. We find that calculating an average of these two Indian tea processors provides financial ratios that best reflect the broader experience of the garlic industry and is consistent with our practices during the last three reviews. For these preliminary results, we are using Tata Tea's and Limtex's financial data, since tea is comparable to subject merchandise (*i.e.*, whole and peeled garlic) and each company's non–integrated production process is similar to that of Jinxiang Juxinyan. We find that the resulting financial ratios from the average of Tata Tea's and Limtex's financial data provide the best surrogate for the garlic industry in the PRC as a whole, based on the information on the record of this review. *See* Surrogate Values Memorandum.

Other Factors of Production

We valued the packing material inputs using weighted–average unit import values derived from the Monthly Statistics of the Foreign Trade of India (MSFTI), as published by the Directorate General of Commercial Intelligence and Statistics of the Ministry of Commerce and Industry, Government of India, and compiled by the World Trade Atlas (WTA), available at http://www.gtis.com/wta.htm. The Indian WTA import data are reported in dollars and are contemporaneous with the POR.[4] Indian SVs denominated in Indian rupees were converted to U.S. dollars using the applicable daily exchange rate for India for the POR. *See* http://www.ia.ita.doc.gov/exchange/index.html. Where appropriate, we converted the units of measure to kilograms. *See* Surrogate Values Memorandum.

Furthermore, with regard to the WTA Indian import–based SVs, we disregarded prices from NME countries[5] and those we have reason to believe or suspect may be subsidized, because we have found in other proceedings that these exporting countries maintain broadly available, non–industry-specific export subsidies and, therefore, there is reason to believe or suspect that all exports to all markets from such countries may be subsidized.[6] We are also guided by the statute's legislative history that explains that it is not necessary to conduct a formal investigation to ensure that such prices are not subsidized. *See* H.R. Rep. No. 576 100th Cong., 2. Sess. 590–91 (1988). Rather, the Department was instructed by Congress to base its decision on information that is available to it at the time it is making its determination. Therefore, we excluded export prices from Indonesia, South Korea, Thailand, and India when calculating the Indian import–based SVs. *See* Surrogate Value Memorandum. Finally, we excluded imports that were labeled as originating from an "unspecified" country from the average Indian import values, because we could not be certain that they were not from either an NME or a country with general export subsidies.

As discussed above, the Department valued surrogate truck freight cost by using a per–unit average rate calculated from August 2008 data on the following Web site: http://www.infobanc.com/logistics/logtruck.htm. *See Polyethylene Retail Carrier Bags from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 52282, 52286 (September 9, 2008) (and unchanged in *Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 6857 (February 11, 2009)); and Surrogate Value Memorandum at Attachment 9.

To value electricity, the Department used March 2008 electricity price rates from Electricity Tariff & Duty and Average Rates of Electricity Supply in India, published by the Central Electricity Authority of the Government of India. Because these data were contemporaneous with the POR, we did not adjust the average value. *See* Surrogate Value Memorandum at Attachment 4.

For direct labor, indirect labor and packing labor, consistent with 19 CFR 351.408(c)(3), we used the PRC regression–based wage rates reflective of the observed relationship between wages and national income in ME countries as reported on Import Administration's Web site. *See* "Expected Wages of Selected NME Countries" (revised December 2009) (available at http://www.trade.gov/ia/). For further details on the labor calculation, *see* Surrogate Value Memorandum at Attachment 5. Because the regression–based wage rates do not separate the labor rates into different skill levels or types of labor, we applied the same wage rate to all skill levels and types of labor reported by Jinxiang Jininyuan.

Currency Conversion

We made currency conversions into U.S. dollars, in accordance with section 773A(a) of the Act, based on the exchange rates in effect on the date of the U.S. sale, as certified by the Federal Reserve Bank. *See* http://www.ia.ita.doc.gov/exchange/index.html.

Preliminary Results of the Review

As a result of our review, we preliminarily find that the following

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[4] *See Surrogate Value Memorandum* at Attachment 1.

[5] The NME countries are Armenia, Azerbaijan, Belarus, Georgia, Kyrgyz Republic, Moldova, PRC, Tajikistan, Turkmenistan, Uzbekistan, and Vietnam.

[6] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results of the 1998-1999 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part*, 66 FR 1953 (January 10, 2001), and accompanying Issues and Decision Memorandum at Comment 1; *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China; Final Results of 1999-2000 Administrative Review, Partial Rescission of Review, and Determination Not To Revoke Order in Part*, 66 FR 57420 (November 15, 2001), and accompanying Issues and Decision Memorandum at Comment 1; and *China National Machinery Imp. & Exp. Corp. v. United States*, 293 F. Supp. 2d 1334, 1339 (CIT 2003), as affirmed by the Federal Circuit, 104 Fed. Appx. 183 (Fed. Cir. 2004).

margin exists for Qingdao Sea–line during the period November 1, 2008 through April 30, 2009:

FRESH GARLIC FROM THE PRC

Exporter/Manufacturer	Weighted–Average Margin (Percent)
Exported by Qingdao Sea–line International Trading Co., Ltd. and Produced by Jinxiang County Juxinyuan Trading Co. Ltd.	171.20

Assessment Rates

The Department will determine, and CBP shall assess, antidumping duties on all appropriate entries. Consistent with the *Fresh Garlic From the People's Republic of China: Final Results and Partial Rescission of the 13th Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 29174 (June 19, 2009) (*Final Results Garlic Thirteenth Review*), we will direct CBP to assess importer–specific assessment rates based on the resulting per–unit (*i.e.*, per kilogram) amount on each entry of the subject merchandise during the POR. *See Final Results Garlic Thirteenth Review*. Specifically, we will divide the total dumping margins for each importer by the total quantity of subject merchandise sold to that importer during the POR to calculate a per–unit assessment amount. We will direct CBP to assess importer–specific assessment rates based on the resulting per–unit (*i.e.*, per kilogram) amount on each entry of the subject merchandise during the POR if any importer–specific assessment rate calculated in the final results of this review is above *de minimis*. The Department will issue appropriate assessment instructions directly to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

Consistent with the final results of the *Final Results Garlic Thirteenth Review*, we will establish and collect a per–kilogram cash–deposit amount which will be equivalent to the company–specific dumping margin published in the final results of this review. Specifically, the following cash deposit requirements will be effective upon publication of the final results of this review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results, as provided by section 751(a)(1) of the Act: (1) for subject merchandise produced by Jinxiang Juxinyuan and exported by Qingdao Sea–line, the cash deposit rate will be the per–unit rate determined in the final result of this new shipper review and; (2) for subject merchandise exported by Qingdao Sea–line but not produced by Jinxiang Juxinyuan, the cash deposit rate will be the per–unit PRC–wide rate. These requirements, when imposed, shall remain in effect until further notice.

Disclosure

We will disclose the calculations used in our analysis to parties to this proceeding not later than ten days after the date of public announcement, or if there is no public announcement within five days of the date of publication of this notice. *See* 19 CFR 351.224(b).

Comments

Interested parties are invited to comment on these preliminary results and may submit case briefs and/or written comments within 30 days of the date of publication of this notice, unless otherwise notified by the Department. *See* 19 CFR 351.309(c)(ii). Rebuttal briefs, limited to issues raised in the case briefs, will be due five days later, pursuant to 19 CFR 351.309(d). Parties who submit case or rebuttal briefs in these proceedings are requested to submit with each argument: (1) a statement of the issue; and (2) a brief summary of the argument. Parties are requested to provide a summary of the arguments not to exceed five pages and a table of statutes, regulations, and cases cited. Additionally, parties are requested to provide their case and rebuttal briefs in electronic format (e.g., preferably in Microsoft Word). Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration within 30 days of the date of publication of this notice. Requests should contain: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of issues to be discussed. *See* 19 CFR 351.310(c). Issues raised in the hearing will be limited to those raised in case and rebuttal briefs. The Department will issue the final results of this review, including the results of its analysis of issues raised in any such written briefs not later than 90 days after these preliminary results are issued, unless the final results are extended. *See* 19 CFR 351.214(i).

Notification to Importers

This notice serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

We are issuing and publishing these preliminary results in accordance with sections 751(a)(2)(B) and 777(i) of the Act, and 19 CFR 351.214(h).

Dated: April 27, 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 2010–10610 Filed 5–04–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

Foreign–Trade Zones Board

[Order No. 1675]

Reorganization/Expansion of Foreign–Trade Zone 21

Charleston, South Carolina, Area

Pursuant to its authority under the Foreign–Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign–Trade Zones Board (the Board) adopts the following Order:

WHEREAS, the South Carolina State Ports Authority, grantee of Foreign–Trade Zone 21, submitted an application to the Board for authority to reorganize and expand its zone to delete Sites 3 and 10 in their entirety, remove acreage from Sites 5 and 7, and add eight new sites (proposed Sites 16–23) in the Charleston, South Carolina, area within and adjacent to the Charleston Customs and Border Protection port of entry (FTZ Docket 15–2009, filed 4/8/09);

WHEREAS, notice inviting public comment was given in the **Federal Register** (74 FR 17452–17453, 4/15/09) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

WHEREAS, the Board adopts the findings and recommendation of the examiner's report, and finds that the requirements of the FTZ Act and Board's regulations are satisfied, and that the proposal, with respect to Sites 3, 5, 7 and 10 and Sites 16, 17, 18, 21, 22 and 23, is in the public interest;

NOW, THEREFORE, the Board hereby orders:

The application to reorganize and expand FTZ 21 is approved in part (with respect to Sites 3, 5, 7 and 10 and Sites 16, 17, 18, 21, 22 and 23), subject to the FTZ Act and the Board's

regulations, including Section 400.28, and to the Board's standard 2,000–acre activation limit for the overall general–purpose zone project, to sunset provisions that would terminate authority on April 30, 2013, for existing Sites 1–15 and 24 and on April 30, 2015, for Sites 16, 17, 18, 21 and 23 where no activity has occurred under FTZ procedures before those dates, and to a five-year time limit (to April 30, 2015) for Site 22 (subject to extension upon review).

Signed at Washington, DC, this 1st day of April 2010.

Ronald K. Lorentzen,

Deputy Assistant Secretaryfor Import Administration Alternate ChairmanForeign–Trade Zones Board.

ATTEST:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2010–10618 Filed 5–4–10; 8:45 am]

BILLING CODE 3510–DS–S

DEPARTMENT OF COMMERCE

International Trade Administration

Request for Nominations for the Industry Trade Advisory Committees (ITACs)

AGENCY: International Trade Administration, Manufacturing and Services.

ACTION: Request for nominations.

SUMMARY: On February 17, 2010, the Secretary of Commerce and the United States Trade Representative (the USTR) renewed the charters of the 16 Industry Trade Advisory Committees (ITACs) and the Committee of Chairs of the ITACs for a four-year term to expire on February 17, 2014. The ITACs provide detailed policy and technical advice, information, and recommendations to the Secretary and the USTR regarding trade barriers, negotiation of trade agreements, and implementation of existing trade agreements affecting industry sectors; and perform other advisory functions relevant to U.S. trade policy matters as may be requested by the Secretary and the USTR or their designees. There are currently opportunities for membership on each ITAC. Nominations will be accepted for current vacancies and those that occur throughout the remainder of the charter term, which expires on February 17, 2014.

DATES: Appointments will be made on a rolling basis. For that reason, nominations will be accepted through February 17, 2014.

ADDRESSES: Submit nominations to Ingrid V. Mitchem, Director, Industry Trade Advisory Center, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Room 4043, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Ingrid V. Mitchem, Director, Industry Trade Advisory Center, (202) 482–3268.

Recruitment information also is available on the International Trade Administration Web site at: *http://www.trade.gov/itac.*

SUPPLEMENTARY INFORMATION: Pursuant to the Federal Advisory Committee Act, as amended (5 U.S.C. App.) and section 135 of the Trade Act of 1974, as amended (19 U.S.C. 2155), the Secretary of Commerce (the Secretary) and the United States Trade Representative (USTR) have renewed the charters of 16 Industry Trade Advisory Committees (ITACs) and the Committee of Chairs of the ITACs. The Secretary and the USTR welcome nominations for the ITACs listed below:

Industry Trade Advisory Committees on:

(ITAC 1) Aerospace Equipment
(ITAC 2) Automotive Equipment and Capital Goods
(ITAC 3) Chemicals, Pharmaceuticals, Health/Science Products and Services
(ITAC 4) Consumer Goods
(ITAC 5) Distribution Services
(ITAC 6) Energy and Energy Services
(ITAC 7) Forest Products
(ITAC 8) Information and Communications Technologies, Services, and Electronic Commerce
(ITAC 9) Nonferrous Metals and Building Materials
(ITAC 10) Services and Finance Industries
(ITAC 11) Small and Minority Business
(ITAC 12) Steel
(ITAC 13) Textiles and Clothing
(ITAC 14) Customs Matters and Trade Facilitation
(ITAC 15) Intellectual Property Rights
(ITAC 16) Standards and Technical Trade Barriers

Background

Section 135 of the Trade Act of 1974, as amended (19 U.S.C. 2155), directed the establishment of a private-sector trade advisory system to ensure that U.S. trade policy and trade negotiation objectives adequately reflect U.S. commercial and economic interests. Section 135(a)(1) directs the President to:

> Seek information and advice from representative elements of the private sector and the non-Federal governmental sector with respect to—
>
> (A) Negotiating objectives and bargaining positions before entering into a trade agreement under [Subchapter I of the Trade Act of 1974 (19 U.S.C. 2111–2241) and section 2103 of the Bipartisan Trade Promotion Authority Act of 2002 (19 U.S.C. 3803)];
>
> (B) The operation of any trade agreement once entered into, including preparation for dispute settlement panel proceedings to which the United States is a party; and
>
> (C) Other matters arising in connection with the development, implementation, and administration of the trade policy of the United States * * *

Section 135(c)(2) of the 1974 Trade Act provides that:

> (2) The President shall establish such sectoral or functional advisory committees as may be appropriate. Such committees shall, insofar as is practicable, be representative of all industry, labor, agricultural, or service interests (including small business interests) in the sector or functional areas concerned. In organizing such committees, the United States Trade Representative and the Secretaries of Commerce, Labor, Agriculture, the Treasury, or other executive departments, as appropriate, shall—
>
> (A) Consult with interested private organizations; and
>
> (B) Take into account such factors as—
>
> (i) Patterns of actual and potential competition between United States industry and agriculture and foreign enterprise in international trade,
>
> (ii) The character of the nontariff barriers and other distortions affecting such competition,
>
> (iii) The necessity for reasonable limits on the number of such advisory committees,
>
> (iv) The necessity that each committee be reasonably limited in size, and
>
> (v) In the case of each sectoral committee, that the product lines covered by each committee be reasonably related.

Pursuant to this provision, the Department of Commerce (Commerce) and the Office of the USTR (USTR) have established and co-administer 16 ITACs, the Committee of Chairs of the ITACs, and the Industry Trade Advisory Center.

Functions

The duties of the ITACs are to provide the President, through the Secretary and the USTR, with detailed policy and technical advice, information, and recommendations regarding trade barriers, negotiation of trade agreements, and implementation of existing trade agreements affecting industry sectors; and perform other advisory functions relevant to U.S. trade policy matters as may be requested by the Secretary and the USTR or their designees. The ITACs provide nonpartisan, industry input in the development of trade policy objectives. The ITACs' efforts have assisted the United States in putting forward unified positions when it negotiates trade agreements.

The ITACs address market-access problems; barriers to trade; tariff levels; discriminatory foreign procurement practices; and information, marketing, and advocacy needs of their industry sector. Thirteen ITACs provide advice and information on issues that affect specific sectors of U.S. industry. Three ITACs focus on cross-cutting, functional issues that affect all industry sectors: customs matters and trade facilitation (ITAC 14); intellectual property rights (ITAC 15); and standards and technical trade barriers (ITAC 16). In addition to members appointed exclusively to these three ITACs, ITACs 1–13 each may select a member to represent their ITAC on each of these three cross-cutting ITACs so that a broad range of industry perspectives is represented. Other trade policy issues, *e.g.,* government procurement, subsidies, etc., may be addressed in *ad hoc* working groups created by the ITACs.

Each ITAC meets an average of six times a year in Washington, DC. Some ITACS meet more often depending on the work of a particular committee.

The members, all of whom come from the private sector, serve in a representative capacity presenting the views and interests of a U.S. entity or U.S. organization and its subsector in their respective industry sectors; they are, therefore, not Special Government Employees. Members serve at the discretion of the Secretary and the USTR.

Members serve without compensation and are responsible for all expenses incurred to attend the meetings. ITAC members are appointed jointly by the Secretary and the USTR. Each ITAC elects a chairperson from the membership of the ITAC, and that chairperson serves on the Committee of Chairs of the ITACs.

Appointments are made following the re-chartering of each ITAC and periodically throughout the four-year charter term. Appointments expire at the end of the ITACs' charter terms, in this case, February 17, 2014.

Appointments to all ITACs are made without regard to political affiliation.

Eligibility and Application Process

[**Note:** USTR and Commerce are currently reviewing the composition of the ITACs. USTR and Commerce issued a **Federal Register** notice on April 27, 2010 (75 FR 22121) requesting public comments as part of this review. USTR and Commerce may issue a supplemental **Federal Register** notice seeking additional nominations to the ITACs following the conclusion of this review process.]

The following eligibility requirements must be met:

1. The applicant must be a U.S. citizen;

2. The applicant must not be a full-time employee of a U.S. governmental entity;

3. The applicant must not be a federally-registered lobbyist;

4. The applicant must not be registered with the Department of Justice under the Foreign Agents Registration Act;

5. The applicant must be able to obtain and maintain a security clearance; and

6. The applicant must represent either:

a. A U.S. entity that is directly engaged in the import or export of goods or services or that provides services in direct support of the international trading activities of other entities; *or*

b. A U.S. organization that: Trades internationally; represents members who trade internationally; consistent with the needs of a Committee; or represents members who have a demonstrated interest in international trade.

For eligibility purposes, a "U.S. entity" is a for-profit firm engaged in commercial, industrial, or professional activities that is incorporated in the United States (or an unincorporated U.S. firm with its principal place of business in the United States) that is controlled by U.S. citizens or by other U.S. entities. An entity is not a U.S. entity if 50 percent plus one share of its stock (if a corporation, or a similar ownership interest of an unincorporated entity) is known to be controlled, directly or indirectly, by non-U.S. citizens or non-U.S. entities.

For eligibility purposes, a "U.S. organization" is an organization, including trade associations and nongovernmental organizations (NGOs), established under the laws of the United States, that is controlled by U.S. citizens, by another U.S. organization (or organizations), or by a U.S. entity (or entities), as determined based on its board of directors (or comparable governing body), membership, and funding sources, as applicable. To qualify as a U.S. organization, more than 50 percent of the board of directors (or comparable governing body) and more than 50 percent of the membership of the organization to be represented must be U.S. citizens, U.S. organizations, or U.S. entities. Additionally, in order for NGOs to qualify as U.S. organizations, at least 50 percent of the NGO's annual revenue must be attributable to nongovernmental U.S. sources.

If a nominee is to represent an entity or organization with 10 percent or greater non-U.S. ownership of its shares or equity, non-U.S. board members, non-U.S. membership, or non-U.S. funding sources, as applicable, the nominee must certify in its statement affirming its eligibility that this non-U.S. interest does not constitute control and will not adversely affect his or her ability to serve as a trade advisor to the United States.

In order to be considered for ITAC membership, a nominee should submit:

(1) Name, title, and relevant contact information of the individual requesting consideration;

(2) The ITAC for which the individual is applying for appointment;

(3) A sponsor letter on the entity's or organization's letterhead containing a brief description of why the applicant should be considered for membership on the ITAC;

(4) The applicant's personal resume demonstrating knowledge of international trade issues;

(5) An affirmative statement that the applicant meets all ITAC eligibility requirements;

(6) An affirmative statement that the applicant is not a federally registered lobbyist, and that the applicant understands that if appointed, the applicant will not be allowed to continue to serve as an ITAC member if the applicant becomes a federally registered lobbyist; and

(7) Information regarding the sponsoring entity, including the control of the entity or organization to be represented and the entity's or organization's size and ownership, product or service line, and trade activities.

Submit applications to Ingrid V. Mitchem, Director, Industry Trade Advisory Center, U.S. Department of Commerce, 14th and Constitution Avenue, NW., Room 4043, Washington, DC 20230.

Additional requirements exist for nominations of consultants and legal advisors. The specific requirements will vary depending on the nature of the entity or organization and interests to be represented. Interested consultants and legal advisors should contact the Industry Trade Advisory Center or consult the ITAC Web Site for additional information on the submission requirements.

Applicants that meet the eligibility criteria will be considered for membership based on the following criteria: Ability to represent the sponsoring U.S. entity's or U.S. organization's and its subsector's interests on trade matters; ability to carry out the objectives of the particular ITAC (including knowledge of and experience in their industry and trade

matters relevant to the work of the ITAC); and ensuring that the ITAC is balanced in terms of points of view, demographics, geography, and entity or organization size.

This notice is issued pursuant to the Federal Advisory Committee Act (5 U.S.C., app. 2), 19 U.S.C. 2155, and 41 CFR part 102–3 relating to advisory committees.

Dated: April 28, 2010.

Nicole Y. Lamb-Hale,

Assistant Secretary for Manufacturing and Services.

[FR Doc. 2010–10495 Filed 5–4–10; 8:45 am]

BILLING CODE P

COMMODITY FUTURES TRADING COMMISSION

Order Finding That the San Juan Financial Basis Contract Traded on the IntercontinentalExchange, Inc., Does Not Perform a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: On October 9, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the San Juan Financial Basis ("SNJ") contract traded on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue an order finding that the SNJ contract does not perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective Date:* April 28, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [2] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[3] The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake a determination whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[5] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[6]

II. Notice of Intent To Undertake SPDC Determination

On October 9, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the SNJ contract performs a significant price discovery function and requested comment from interested parties.[7] Comments were received from Industrial Energy Consumers of America ("IECA"), Working Group of Commercial Energy Firms ("WGCEF"), Platts, ICE, Economists Incorporated ("EI"), Natural Gas Supply Association ("NGSA"),

[1] 74 FR 52188 (October 9, 2009).

[2] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law No. 110–246, 122 Stat. 1624 (June 18, 2008).

[3] 7 U.S.C. 1a(29).

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[5] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). *See* also 73 FR 75888, 75894 (Dec. 12, 2008).

[6] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[7] The Commission's Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

Federal Energy Regulatory Commission ("FERC") and Financial Institutions Energy Group ("FIEG").[8] The comment letters from FERC[9] and Platts did not directly address the issue of whether or not the SNJ contract is a SPDC; IECA expressed the opinion that the SNJ contract did perform a significant price discovery function; and thus, should be subject to the requirements of the core principles enumerated in Section 2(h)(7) of the Act, but did not elaborate on its reasons for saying so or directly address any of the criteria. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the SNJ contract and generally expressed the opinion that the SNJ contract is not a SPDC because it does not meet the material price reference, price linkage and material liquidity criteria for SPDC determination. These comments are more extensively discussed below, as applicable.

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.
- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.
- *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[10] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[11] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

IV. Findings and Conclusions

The San Juan Financial Basis (SNJ) Contract and the SPDC Indicia

The SNJ contract is cash settled based on the difference between the bidweek price index for a particular calendar month at the San Juan Basin on El Paso Natural Gas Company's pipeline, as published in Platts' *Inside FERC's Gas Market Report,* and the final settlement price of the New York Mercantile Exchange's ("NYMEX's") physically-delivered Henry Hub natural gas futures contract for the same calendar month. The Platts bidweek price, which is published monthly, is based on a survey of cash market traders who voluntarily report to Platts data on their fixed-price transactions conducted during the last five business days of the month for physical delivery of natural gas at the San Juan Basin; such bidweek transactions specify the delivery of natural gas on a uniform basis throughout the following calendar month at the agreed upon rate. The Platts bidweek index is published on the first business day of the calendar month in which the natural gas is to be delivered. The size of the SNJ contract is 2,500 million British thermal units ("mmBtu"), and the unit of trading is any multiple of 2,500 mmBtu. The SNJ

[8] IECA describes itself as an "association of leading manufacturing companies" whose membership "represents a diverse set of industries including: plastics, cement, paper, food processing, brick, chemicals, fertilizer, insulation, steel, glass, industrial gases, pharmaceutical, aluminum and brewing." WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." McGraw-Hill, through its division Platts, compiles and calculates monthly natural gas price indices from natural gas trade data submitted to Platts by energy marketers. Platts includes those price indices in its monthly *Inside FERC's Gas Market Report* ("Inside FERC"). ICE is an exempt commercial market, as noted above. EI is an economic consulting firm with offices located in Washington, DC, and San Francisco, CA. NGSA is an industry association comprised of natural gas producers and marketers. FERC is an independent federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, "including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors." The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09-013.html.*

[9] FERC stated that the SNJ contract is cash settled and does not contemplate the actual physical delivery of natural gas. Accordingly, FERC expressed the opinion that a determination by the Commission that a contract performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Natural Gas Act (NGA) over certain sales of natural gas in interstate commerce for resale or with its other regulatory responsibilities under the NGA" and further that, "FERC staff will continue to monitor for any such conflict * * * [and] advise the CFTC" should any such potential conflict arise. CL 07.

[10] In its October 9, 2009, **Federal Register** release, the Commission identified material price reference, price linkage and material liquidity as the possible criteria for SPDC determination of the SNJ contract. Arbitrage was not identified as a possible criterion. As a result, arbitrage will not be discussed further in this document and the associated Order.

[11] 17 CFR part 36, Appendix A.

contract is listed for up to 72 consecutive calendar months.

The Henry Hub,[12] which is located in Erath, Louisiana, is the primary cash market trading and distribution center for natural gas in the United States. It also is the delivery point and pricing basis for the NYMEX's actively traded, physically-delivered natural gas futures contract, which is the most important pricing reference for natural gas in the United States. The Henry Hub, which is operated by Sabine Pipe Line, LLC, serves as a juncture for 13 different pipelines. These pipelines bring in natural gas from fields in the Gulf Coast region and ship it to major consumption centers along the East Coast and Midwest. The throughput shipping capacity of the Henry Hub is 1.8 trillion mmBtu per day.

In addition to the Henry Hub, there are a number of other locations where natural gas is traded. In 2008, there were 33 natural gas market centers in North America.[13] Some of the major trading centers include Alberta, Northwest Rockies, Southern California border and the Houston Ship Channel. For locations that are directly connected to the Henry Hub by one or more pipelines and where there typically is adequate shipping capacity, the price at the other locations usually directly tracks the price at the Henry Hub, adjusted for transportation costs. However, at other locations that are not directly connected to the Henry Hub or where shipping capacity is limited, the prices at those locations often diverge from the Henry Hub price. Furthermore, one local price may be significantly different than the price at another location even though the two markets' respective distances from the Henry Hub are the same. The reason for such pricing disparities is that a given location may experience supply and demand factors that are specific to that region, such as differences in pipeline shipping capacity, unusually high or low demand for heating or cooling or supply disruptions caused by severe weather. As a consequence, local natural gas prices can differ from the Henry Hub price by more than the cost of shipping and such price differences can vary in an unpredictable manner.

The supply of natural gas in the San Juan Basin (encompassing the four-corner region of northwestern New Mexico, northeastern Arizona, and portions of Colorado and Utah) primarily comes from New Mexico natural gas production plants in the cities of Blanco, Chaco, Rio Vista, Milagro and Valverde. The El Paso Natural Gas Company's pipeline system, which is the largest natural gas pipeline system in the Western region of the United States, transports natural gas from the San Juan Basin production area to California, Arizona, and the Arizona/Nevada state border.[14]

The Blanco hub, a market center that includes the San Juan Basin, had an estimated throughput capacity of 1.2 billion cubic feet per day in 2008. Moreover, the number of pipeline interconnections at the San Juan Basin hub was 10 in 2008. Lastly, the pipeline interconnection capacity of the San Juan Basis hub in 2008 was 4.2 billion cubic feet per day, which constituted a 22 percent increase over the pipeline interconnection capacity in 2003.[15] The San Juan Basin is far removed from the Henry Hub and is not directly connected to the Henry Hub.

Natural gas prices at the San Juan Basin typically differ from those at the Henry Hub. Thus, the price of the Henry Hub physically-delivered futures contract is an imperfect proxy for the SNJ price. Moreover, exogenous factors, such as adverse weather, can cause the SNJ gas price to differ from the Henry Hub price by an amount that is more or less than the cost of shipping, making the NYMEX Henry Hub futures contract even less precise as a hedging tool than desired by market participants. Basis contracts[16] allow traders to more accurately discover prices at alternative locations and hedge price risk that is associated with natural gas at such locations. In this regard, a position at a local price for an alternative location can be established by adding the appropriate basis swap position to a position taken in the NYMEX physically-delivered Henry Hub contract (or in the NYMEX or ICE Henry Hub look-alike contract, which cash settle based on the NYMEX physically-delivered natural gas contract's final settlement price).

In its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as the potential SPDC criteria applicable to the SNJ contract. Each of these criteria is discussed below.[17]

1. Material Price Reference Criterion

The Commission's October 9, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "West Gas End of Day" and "OTC Gas End of Day"[18] packages with access to all price data or just current prices plus a selected number of months (*i.e.,* 12, 24, 36 or 48 months) of historical data. These two packages include price data for the SNJ contract.

The Commission also noted that its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study")[19] found that in general, market participants view the ICE as a price discovery market for certain natural gas contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the SNJ contract, while not mentioned by name in the ECM Study, might warrant further study.

The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract is being used as a material price reference and therefore, serving a significant price discovery function.[20] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for

[12] The term "hub" refers to a juncture where two or more natural gas pipelines are connected. Hubs also serve as pricing points for natural gas at the particular locations.

[13] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[14] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/western.html.*

[15] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[16] Basis contracts denote the difference in the price of natural gas at a specified location minus the price of natural gas at the Henry Hub. The differential can be either a positive or negative value.

[17] As noted above, the Commission did not find an indication of arbitrage in connection with this contract; accordingly, that criterion was not discussed in reference to the SNJ contract.

[18] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

[19] *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/pr5403-07_ecmreport.pdf.*

[20] 17 CFR part 36, Appendix A.

instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from, the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

Following the issuance of the **Federal Register** release, the Commission further evaluated ICE's data offerings and their use by industry participants. Although the San Juan Basin is a major trading center for natural gas in the United States and, as noted, ICE sells price information for the SNJ contract, the Commission has found upon further evaluation that the cash market transactions are not being directly based or quoted as a differential to the SNJ contract nor is that contract routinely consulted by industry participants in pricing cash market transactions. Thus, the contract does not meet the Commission's Guidance for the material price reference criterion. Moreover, there are other trading points in the same general vicinity, such as the Waha hub, that are referenced more frequently. Thus, it is not necessary for market participants to independently refer to the SNJ contract for pricing natural gas at this location. In these circumstances, the SNJ contract does not satisfy the direct price reference test for existence of material price reference. Furthermore, the Commission notes that publication of the SNJ contract's prices is not indirect evidence of material price reference. The SNJ contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the San Juan Basin, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the SNJ contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the SNJ contract met the material price reference criterion for a SPDC.[21] The commenters argued that because the SNJ contract is cash-settled, it cannot truly serve as an independent "reference price" for transactions in natural gas at this location. Rather, the commenters argue, the underlying cash price series against which the ICE SNJ contract is settled (in this case, the Inside FERC's Gas Market Report price for natural gas at this location) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too limiting and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, the San Juan Basin is a significant trading center for natural gas in North America. However, traders do not consider the San Juan Basin to be as important as other natural gas trading points, such as the Waha hub and Henry Hub.

ICE[22] also argued that the Commission appeared to base the case that the SNJ contract is potentially a SPDC on a disputable assertion. In issuing its notice of intent to determine whether the SNJ contract is a SPDC, the CFTC cited a general conclusion in its ECM Study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts." ICE states that CFTC's reason is "hard to quantify as the ECM report does not mention" this contract as a potential SPDC. "It is unknown which market participants made this statement in 2007 or the contracts that were referenced." In response to the above comment, the Commission notes that it cited the ECM Study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets merely as an indicia that an investigation of certain ICE contracts may be warranted. The ECM Study was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

Both EI[23] and WGCEF[24] stated that publication of price data in a package format is a weak justification for material price reference. These commenters argue that market participants generally do not purchase ICE data sets for one contract's prices, such as those for the SNJ contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the SNJ prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the SNJ prices have substantial value to them. As mentioned above, the Commission notes that publication of the SNJ contract's prices is not indirect evidence of routine dissemination. The SNJ contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the San Juan Basin, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the SNJ contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the SNJ contract does not meet the material price reference criterion because cash market transactions are not priced either explicitly or implicitly on a frequent and recurring basis at a differential to the SNJ contract's price (direct evidence). Moreover, while the ECM sells the SNJ contract's price data to market participants, market participants likely do not specifically purchase the ICE data packages for the SNJ contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

2. Price Linkage Criterion

In its October 9, 2009, **Federal Register** notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the SNJ contract. In this regard, the final settlement of the SNJ contract is based, in part, on the final settlement price of NYMEX's physically-delivered natural gas futures contract, where NYMEX is registered with the Commission as a DCM.

The Commission's Guidance on Significant Price Discovery Contracts[25] notes that a "price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract." Furthermore, the Guidance notes that, "[f]or a linked

[21] As noted above, IECA expressed the opinion that the SNJ contract met the criteria for SPDC determination but did not provide its reasoning.

[22] CL 04.

[23] CL 05.

[24] CL 02.

[25] Appendix A to the Part 36 rules.

contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract. The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract." Furthermore, the Guidance proposes a threshold price relationship such that prices of the ECM linked contract will fall within a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement or other daily prices over the most recent quarter. Finally, the Commission also stated in the Guidance that it would consider a linked contract that has a trading volume equivalent to 5 percent of the volume of trading in the contract to which it is linked to have sufficient volume to be deemed a SPDC ("minimum threshold").

To assess whether the SNJ contract meets the price linkage criterion, Commission staff obtained price data from ICE and performed the statistical tests cited above. Staff found that, while the SNJ contract price is determined, in part, by the final settlement price of the NYMEX physically-delivered natural gas futures contract (a DCM contract), the imputed SNJ location price (derived by adding the NYMEX Henry Hub Natural Gas price to the ICE SNJ basis price) is not within 2.5 percent of the settlement price of the corresponding NYMEX Henry Hub natural gas futures contract on 95 percent or more of the days. Specifically, during the third quarter of 2009, only 2.2 percent of the SNJ natural gas prices derived from the ICE basis values were within 2.5 percent of the daily settlement price of the NYMEX Henry Hub futures contract. In addition, staff found that the SNJ contract fails to meet the volume threshold requirement. In particular, the total trading volume in the NYMEX Natural Gas contract during the third quarter of 2009 was 14,022,963 contracts, with 5 percent of that number being 701,148 contracts. Trades on the ICE centralized market in the SNJ contract during the same period was 35,836 contracts (equivalent to 8,959 NYMEX contracts, given the size difference).[26] Thus, centralized-market trades in the SNJ contract amounted to less than the minimum volume threshold.[27]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the SNJ contract met the price linkage criterion for a SPDC.[28] Each of the commenters expressed the opinion that the SNJ contract did not appear to meet the above-discussed Commission guidance regarding the price relationship and/or the minimum volume threshold relative to the DCM contract to which the SNJ is linked. Based on its analysis discussed above, the Commission agrees with this assessment.

ii. Conclusion Regarding the Price Linkage Criterion

Based on the above, the Commission finds that the SNJ contract does not meet the price linkage criterion because it fails the price relationship and volume tests provided for in the Commission's Guidance.

3. Material Liquidity Criterion

As noted above, in its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as potential criteria for SPDC determination of the SNJ contract. To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that the prices of the subject contract potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE's electronic platform in the SNJ contract was 391 in the second quarter of 2009, resulting in a daily average of 6.1 trades. During the same period, the SNJ contract had a total trading volume of 30,722 contracts and an average daily trading volume of 480 contracts. Moreover, open interest as of June 30, 2009, was 49,105 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.[29]

In a subsequent filing dated November 13, 2009, ICE reported that total trading volume in the third quarter of 2009 was 35,836 contracts (or 543 contracts on a daily basis). In terms of number of transactions, 402 trades occurred in the third quarter of 2009 (6.1 trades per day). As of September 30, 2009, open interest in the SNJ contract was 59,123 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

As indicated above, the average number of trades per day in the second and third quarters of 2009 was only slightly above the minimum reporting level (5 trades per day). Moreover, trading activity in the SNJ contract, as characterized by total quarterly volume, indicates that the SNJ contract experiences trading activity similar to that of other thinly-traded contracts.[30] Thus, the SNJ contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.[31]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the SNJ contract met the

[26] The size of the NYMEX Henry Hub physically-delivered natural gas futures contract is 10,000 mmBtu. The SNJ contract has a trading unit of 2,500 mmBtu, which is one-quarter the size of the NYMEX Henry Hub contract.

[27] Supplemental data subsequently submitted by the ICE indicated that block trades are included in the on-exchange trades; block trades comprise 61.4 percent of all transactions in the SNJ contract.

[28] As noted above, IECA expressed the opinion that the SNJ contract met the criteria for SPDC determination but did not provide its reasoning.

[29] 74 FR 52188 (October 9, 2009).

[30] Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

[31] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], * * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." For the reasons discussed above, the Commission has found that the SNJ contract does not meet either the price linkage or material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since it cannot be used alone as a basis for a SPDC determination.

material liquidity criterion for a SPDC.[32] These commenters stated that the SNJ contract does not meet the material liquidity criterion for SPDC determination for a number of reasons.

WGCEF,[33] ICE[34] and EI[35] noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day, and noted that the relatively low number of trades per day in the SNJ contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another."

WGCEF, FIEG[36] and NGSA[37] noted that the SNJ contract represents a differential, which does not affect other contracts, including the NYMEX Henry Hub contract and physical gas contracts. FIEG and WGCEF also noted that the SNJ contract's trading volume represents only a fraction of natural gas trading.

ICE opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to *report* trade data to the CFTC." Furthermore, FIEG cautioned the Commission in using a reporting threshold as a measure of liquidity. In this regard, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"[38] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC but this does not mean that the contract will be found to be a SPDC merely because it met the reporting threshold.

ICE and EI proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in *all months of each contract*" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a *single* traded month or strip of a given contract."[39] A similar argument was made by EI, which observed that the five-trades-per-day number "is highly misleading * * * because the contracts can be offered for as long as 120 months, [thus] the average per day for an individual contract may be less than 1 per day."

It is the Commission's opinion that liquidity, as it pertains to the SNJ contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE SNJ contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the SNJ contract does not meet the material price reference or price linkage criteria, according to the Commission's Guidance, it would be unnecessary to evaluate whether the SNJ contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

ii. Conclusion Regarding Material Liquidity

The Commission has found that the SNJ contract does not meet the material liquidity criterion.

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the SNJ contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA. Specifically, the SNJ contract does not meet the material price reference, price linkage or material liquidity criteria. Accordingly, the Commission will issue the attached Order declaring that the SNJ contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its SNJ contract.[40] Accordingly, with respect to its SNJ contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply with the applicable reporting requirements.

V. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")[41] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA[42] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to

[32] As noted above, IECA expressed the opinion that the SNJ contract met the criteria for SPDC determination but did not provide its reasoning.

[33] CL 02.

[34] CL 04.

[35] CL 05.

[36] CL 08.

[37] CL 06.

[38] 73 FR 75892 (December 12, 2008).

[39] In addition, both EI and ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 9, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 61.4 percent of all transactions in the SNJ contract. The Commission acknowledges that the open interest information it provided in its October 9, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

[40] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[41] 44 U.S.C. 3507(d).

[42] 7 U.S.C. 19(a).

effectuate any of the provisions or accomplish any of the purposes of the Act. The Commission has considered the costs and benefits in light of the specific provisions of section 15(a) of the Act and has concluded that the Order, required by Congress to strengthen Federal oversight of exempt commercial markets and to prevent market manipulation, is necessary and appropriate to accomplish the purposes of section 2(h)(7) of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order fining that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Amendments to section 4(i) of the CEA authorize the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

The Commission has concluded that ICE's SNJ contract, which is the subject of the attached Order, is not a SPDC; accordingly, the Commission's Order imposes no additional costs and no additional statutorily or regulatory mandated responsibilities on the ECM.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [43] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect exempt commercial markets. The Commission previously has determined that exempt commercial markets are not small entities for purposes of the RFA.[44] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Order, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

VI. Order

Order Regarding the San Juan Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the San Juan Financial Basis contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference, price linkage and material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity [45] with respect to the San Juan Financial Basis contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the San Juan Basin Financial Basis contract with the issuance of this Order.

This Order is based on the representations made to the Commission by the IntercontinentalExchange, Inc., dated July 27, 2009, and November 13, 2009, and other supporting material. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its current determination that the San Juan Financial Basis contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

Issued in Washington, DC, on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–10343 Filed 5–4–10; 8:45 am]

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[43] 5 U.S.C. 601 *et seq.*

[44] 66 FR 42256, 42268 (Aug. 10, 2001).

[45] 7 U.S.C. 1a(29).

COMMODITY FUTURES TRADING COMMISSION

Order Finding that the TETCO–M3 Financial Basis Contract Traded on the IntercontinentalExchange, Inc., Does Not Perform a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: On October 9, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the TETCO–M3 Financial Basis ("TMT") contract traded on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue an order finding that the TMT contract does not perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective Date:* April 28, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov.*

SUPPLEMENTARY INFORMATION:

[1] 74 FR 52186 (October 9, 2009).

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [2] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[3] The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[5] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[6]

II. Notice of Intent To Undertake SPDC Determination

On October 9, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the TMT contract performs a significant price discovery function and requested comment from interested parties.[7] Comments were received from Industrial Energy Consumers of America ("IECA"), Working Group of Commercial Energy Firms ("WGCEF"), Platts, ICE, Economists Incorporated ("EI"), Natural Gas Supply Association ("NGSA"), Federal Energy Regulatory Commission ("FERC") and Financial Institutions Energy Group ("FIEG").[8] The comment letters from FERC [9] and Platts did not directly address the issue of whether or not the TMT contract is a SPDC; IECA expressed the opinion that the TMT contract did perform a significant price discovery function; and thus, should be subject to the requirements of the core principles enumerated in Section 2(h)(7) of the Act, but did not elaborate on its reasons for saying so or directly address any of the criteria. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the TMT contract and generally expressed the opinion that the TMT contract is not a SPDC because it does not meet the price linkage, material price reference and material liquidity criteria for SPDC determination. These comments are more extensively discussed below, as applicable.

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or

[2] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

[3] 7 U.S.C. 1a(29).

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[5] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). See also 73 FR 75888, 75894 (Dec. 12, 2008).

[6] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[7] The Commission's Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

[8] IECA describes itself as an "association of leading manufacturing companies" whose membership "represents a diverse set of industries including: plastics, cement, paper, food processing, brick, chemicals, fertilizer, insulation, steel, glass, industrial gases, pharmaceutical, aluminum and brewing." WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." McGraw-Hill, through its division Platts, compiles and calculates monthly natural gas price indices from natural gas trade data submitted to Platts by energy marketers. Platts includes those price indices in its monthly *Inside FERC's Gas Market Report* ("Inside FERC"). ICE is an exempt commercial market, as noted above. EI is an economic consulting firm with offices located in Washington, DC, and San Francisco, CA. NGSA is an industry association comprised of natural gas producers and marketers. FERC is an independent Federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, "including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors." The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09–014.html.*

[9] FERC stated that the TMT contract is cash settled and does not contemplate the actual physical delivery of natural gas. Accordingly, FERC expressed the opinion that a determination by the Commission that a contract performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Natural Gas Act (NGA) over certain sales of natural gas in interstate commerce for resale or with its other regulatory responsibilities under the NGA" and further that, "FERC staff will continue to monitor for any such conflict * * * [and] advise the CFTC" should any such potential conflict arise. CL 07.

contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.

• *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.

• *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.

• *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[10] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[11] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

IV. Findings and Conclusions

The TETCO–M3 Financial Basis (TMT) Contract and the SPDC Indicia

The TMT contract is cash settled based on the difference between the bidweek price index for a particular calendar month at the Texas Eastern Transmission Company's ("TETCO's") M3 zone, as published in Platts' *Inside FERC's Gas Market Report,* and the final settlement price of the New York Mercantile Exchange's ("NYMEX's") physically-delivered Henry Hub natural gas futures contract for the same calendar month. The Platts bidweek price, which is published monthly, is based on a survey of cash market traders who voluntarily report to Platts data on their fixed-price transactions conducted during the last five business days of the month for physical delivery of natural gas at the M3 zone; such bidweek transactions specify the delivery of natural gas on a uniform basis throughout the following calendar month at the agreed upon rate. The Platts bidweek index is published on the first business day of the calendar month in which the natural gas is to be delivered. The size of the TMT contract is 2,500 million British thermal units ("mmBtu"), and the unit of trading is any multiple of 2,500 mmBtu. The TMT contract is listed for up to 72 consecutive calendar months.

The Henry Hub,[12] which is located in Erath, Louisiana, is the primary cash market trading and distribution center for natural gas in the United States. It also is the delivery point and pricing basis for the NYMEX's actively traded, physically-delivered natural gas futures contract, which is the most important pricing reference for natural gas in the United States. The Henry Hub, which is operated by Sabine Pipe Line, LLC, serves as a juncture for 13 different pipelines. These pipelines bring in natural gas from fields in the Gulf Coast region and ship it to major consumption centers along the East Coast and Midwest. The throughput shipping capacity of the Henry Hub is 1.8 trillion mmBtu per day.

In addition to the Henry Hub, there are a number of other locations where natural gas is traded. In 2008, there were 33 natural gas market centers in North America.[13] Some of the major trading centers include Alberta, Northwest Rockies, Southern California border and the Houston Ship Channel. For locations that are directly connected to the Henry Hub by one or more pipelines and where there typically is adequate shipping capacity, the price at the other locations usually directly tracks the price at the Henry Hub, adjusted for transportation costs. However, at other locations that are not directly connected to the Henry Hub or where shipping capacity is limited, the prices at those locations often diverge from the Henry Hub price. Furthermore, one local price may be significantly different than the price at another location even though the two markets' respective distances from the Henry Hub are the same. The reason for such pricing disparities is that a given location may experience supply and demand factors that are specific to that region, such as differences in pipeline shipping capacity, unusually high or low demand for heating or cooling or supply disruptions caused by severe weather. As a consequence, local natural gas prices can differ from the Henry Hub price by more than the cost of shipping and such price differences can vary in an unpredictable manner.

TETCO transports natural gas from production areas in Texas, Louisiana, and the Gulf of Mexico to the Mid-Atlantic and Northeast regions of the United States. The TETCO system, owned and operated by Spectra Energy Transmission, spans some 9,200 miles and has a capacity of 6.7 billion cubic feet per day with 75 billion cubic feet of storage.[14] The TMT contract prices trading activity at the M3 zone of

[10] In its October 9, 2009, **Federal Register** release, the Commission identified material price reference, price linkage and material liquidity as the possible criteria for SPDC determination of the TMT contract. Arbitrage was not identified as a possible criterion. As a result, arbitrage will not be discussed further in this document and the associated Order.

[11] 17 CFR part 36, Appendix A.

[12] The term "hub" refers to a juncture where two or more natural gas pipelines are connected. Hubs also serve as pricing points for natural gas at the particular locations.

[13] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[14] *See http://www.spectraenergy.com/what_we_do/businesses/us/assets/texas_eastern/.*

TETCO's pipeline. The M3 zone is defined as the portion of the pipeline traversing the area between eastern Pennsylvania near the New Jersey border and north central New Jersey. Specifically, the Platts index includes deliveries at any point between the Delmont compressor station in Westmoreland County, Pennsylvania, and the Hanover and Linden stations in Morris County, New Jersey. Included are deals delivered at interconnections with New York City distributors' citygates and with Algonquin Gas Transmission at Lambertville in Hunterdon County, New Jersey, and at the Hanover station.

The Dominion hub, a market center that encompasses the Leidy area of north central Pennsylvania includes the TETCO M3 natural gas trading hub. The Dominion market center had an estimated throughput capacity of 2.5 billion cubic feet per day in 2008. Moreover, the number of pipeline interconnections at the Dominion hub was 17 in 2008, up from 16 in 2003. Lastly, the pipeline interconnection capacity of the Dominion hub in 2008 was 8.3 billion cubic feet per day, which constituted a 42 percent increase over the pipeline interconnection capacity in 2003.[15] The TMT hub is far removed from the Henry Hub but is directly connected to the Henry Hub by TETCO's interstate pipeline system.

The local price at the TMT location typically differs from the price at the Henry Hub. Thus, the price of the Henry Hub physically-delivered futures contract is an imperfect proxy for the TMT price. Moreover, exogenous factors, such as adverse weather, can cause the TMT gas price to differ from the Henry Hub price by an amount that is more or less than the cost of shipping, making the NYMEX Henry Hub futures contract even less precise as a hedging tool than desired by market participants. Basis contracts[16] allow traders to more accurately discover prices at alternative locations and hedge price risk that is associated with natural gas at such locations. In this regard, a position at a local price for an alternative location can be established by adding the appropriate basis swap position to a position taken in the NYMEX physically-delivered Henry Hub contract (or in the NYMEX or ICE Henry Hub look-alike contract, which cash settle based on the NYMEX physically-delivered natural gas contract's final settlement price).

In its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as the potential SPDC criteria applicable to the TMT contract. Each of these criteria is discussed below.[17]

1. Material Price Reference Criterion

The Commission's October 9, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "East Gas End of Day" and "OTC Gas End of Day"[18] packages with access to all price data or just current prices plus a selected number of months (*i.e.,* 12, 24, 36 or 48 months) of historical data. These two packages include price data for the TMT contract.

The Commission also noted that its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study")[19] found that in general, market participants view the ICE as a price discovery market for certain natural gas contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the TMT contract, while not mentioned by name in the ECM Study, might warrant further study. Following the issuance of the **Federal Register** release, the Commission further evaluated ICE's data offerings and their use by industry participants. The TETCO M3 zone is a significant trading center for natural gas but is not as important as other hubs, such as the Henry Hub, for pricing natural gas in the eastern half of the U.S. marketplace.

The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.[20] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

The M3 zone is a major trading center for natural gas in the United States and, as noted, ICE sells price information for the TMT contract. Upon further evaluation, however, the Commission has found that the cash market transactions are not being directly based on or quoted as a differential to the TMT contract nor is that contract routinely consulted by industry participants in pricing cash market transactions. Thus, the contract does not meet the Commission's Guidance for the material price reference criterion. In this regard, liquidity constraints caused by severe winter weather on peak days may create complications for cash market participants. Because the TMT contract is not consulted on a frequent basis, it does not satisfy the direct price reference test for the existence of material price reference. Furthermore, the Commission notes that publication of the TMT contract's prices is not indirect evidence of material price reference. The TMT contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the M3 zone, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the TMT contract's prices and do not consult

[15] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[16] Basis contracts denote the difference in the price of natural gas at a specified location minus the price of natural gas at the Henry Hub. The differential can be either a positive or negative value.

[17] As noted above, the Commission did not find an indication of arbitrage in connection with this contract; accordingly, that criterion was not discussed in reference to the TMT contract.

[18] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

[19] *http://www.cftc.gov/ucm/groups/public/newsroom/documents/file/pr5403-07_ecmreport.pdf*

[20] 17 CFR part 36, Appendix A.

such prices on a frequent and recurring basis in pricing cash market transactions.

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the TMT contract met the material price reference criterion for a SPDC.[21] The commenters argued that because the TMT contract is cash-settled, it cannot truly serve as an independent "reference price" for transactions in natural gas at this location. Rather, the commenters argue, the underlying cash price series against which the ICE TMT contract is settled (in this case, the Platts bidweek price for natural gas at this location) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too limiting and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, the M3 zone is a significant trading center for natural gas in North America. However, traders do not consider the M3 zone to be as important as other natural gas trading points.

ICE also argued that the Commission appeared to base the case that the TMT contract is potentially an SPDC on a disputable assertion. In issuing its notice of intent to determine whether the TMT contract is an SPDC, the CFTC cited a general conclusion in its ECM Study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts." ICE states that CFTC's reason is "hard to quantify as the ECM report does not mention" this contract as a potential SPDC. "It is unknown which market participants made this statement in 2007 or the contracts that were referenced." In response to the above comment, the Commission notes that it cited the ECM Study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets merely as an indicia that an investigation of certain ICE contracts may be warranted. The ECM Study was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

Both EI[22] and WGCEF[23] stated that publication of price data in a package format is a weak justification for material price reference. These commenters argue that market participants generally do not purchase ICE data sets for one contract's prices, such as those for the TMT contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the TMT prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the TMT prices have substantial value to them. As mentioned above, the Commission notes that publication of the TMT contract's prices is not indirect evidence of routine dissemination. The TMT contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the M3 zone, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the TMT contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the TMT contract does not meet the material price reference criterion because cash market transactions are not priced either explicitly or implicitly on a frequent and recurring basis at a differential to the TMT contract's price (direct evidence). Moreover, while the ECM sells the TMT contract's price data to market participants, market participants likely do not specifically purchase the ICE data packages for the TMT contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

2. Price Linkage Criterion

In its October 9, 2009, **Federal Register** notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the TMT contract. In this regard, the final settlement of the TMT contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas futures contract, where the NYMEX is registered with the Commission as a DCM.

The Commission's Guidance on Significant Price Discovery Contracts notes that a "price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract."[24] Furthermore, the Guidance notes that, "[f]or a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract. The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract."[25] Furthermore, the Guidance proposes a threshold price relationship such that prices of the ECM linked contract will fall within a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement or other daily prices over the most recent quarter. Finally, in Guidance the Commission stated that it would consider a linked contract that has a trading volume equivalent to 5 percent of the volume of trading in the contract to which it is linked to have sufficient volume to be deemed a SPDC ("minimum threshold").[26]

To assess whether the TMT contract meets the price linkage criterion, Commission staff obtained price data from ICE and performed the statistical tests cited above. Staff found that, while the TMT contract price is determined, in part, by the final settlement price of the NYMEX physically-delivered natural gas futures contract (a DCM contract), the imputed TMT location price (derived by adding the NYMEX Henry Hub Natural Gas price to the ICE TCO basis price) is not within 2.5 percent of the settlement price of the corresponding NYMEX Henry Hub natural gas futures contract on 95 percent or more of the days. Specifically, during the third quarter of 2009, none of the TMT natural gas prices derived from the ICE basis values were within 2.5 percent of the daily settlement price of the NYMEX Henry Hub futures contract. In addition, staff found that the TMT contract fails to

[21] As noted above, IECA expressed the opinion that the TMT contract met the criteria for SPDC determination but did not provide its reasoning.

[22] CL 05.

[23] CL 02.

[24] Appendix A to the Part 36 rules.

[25] *Id.*

[26] *Id.*

meet the volume threshold requirement. In particular, the total trading volume in the NYMEX Natural Gas contract during the third quarter of 2009 was 14,022,963 contracts, with 5 percent of that number being 701,148 contracts. Trades on the ICE centralized market in the TMT contract during the same period was 145,681 contracts (equivalent to 36,420 NYMEX contracts, given the size difference).[27] Thus, centralized-market trades in the TMT contract amounted to less than the minimum threshold.[28]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the TMT contract met the price linkage criterion for a SPDC.[29] Each of the commenters expressed the opinion that the TMT contract did not appear to meet the above-discussed Commission guidance regarding the price relationship and/or the minimum volume threshold relative to the DCM contract to which the TMT is linked. Based on its analysis discussed above, the Commission agrees with this assessment.

ii. Conclusion Regarding the Price Linkage Criterion

Based on the above, the Commission finds that the TMT contract does not meet the price linkage criterion because it fails the price relationship and volume tests provided for in the Commission's Guidance.

3. Material Liquidity Criterion

As noted above, in its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as potential criteria for SPDC determination of the TMT contract. To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that the prices of the subject contract potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE's electronic platform in the TMT contract was 1,073 in the second quarter of 2009, resulting in a daily average of 16.8 trades. During the same period, the TMT contract had a total trading volume of 145,328 contracts and an average daily trading volume of 2,271 contracts. Moreover, open interest as of June 30, 2009, was 168,963 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.[30]

In a subsequent filing dated November 13, 2009, ICE reported that total trading volume in the third quarter of 2009 was 145,681 contracts (or 2,207 contracts on a daily basis). In terms of number of transactions, 1,140 trades occurred in the third quarter of 2009 (17.3 trades per day). As of September 30, 2009, open interest in the TMT contract was 251,573 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

As indicated above, the average number of trades per day in the second and third quarters of 2009 was above the minimum reporting level (5 trades per day). Moreover, trading activity in the TMT contract, as characterized by total quarterly volume, indicates that the TMT contract experiences trading activity that is greater than in thinly-traded contracts.[31] This level of trading activity would ordinarily merit a statistical analysis to measure the effect that the prices of the subject contract potentially may have on prices for other contracts listed on an ECM or DCM. However, in light of the fact that the Commission has found that the TETCO–M3 contract does not meet the material price reference or price linkage criteria, according to the Commission's guidance it would be unnecessary to evaluate whether the TETCO–M3 contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.[32]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the TMT contract met the material liquidity criterion for a SPDC.[33] These commenters stated that the TMT contract does not meet the material liquidity criterion for SPDC determination for a number of reasons.

WGCEF,[34] ICE[35] and EI[36] noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day, and noted that the relatively low number of trades per day in the TMT contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another."[37]

WGCEF, FIEG[38] and NGSA[39] noted that the TMT contract represents a differential, which does not affect other contracts, including the NYMEX Henry Hub contract and physical gas contracts. FIEG and WGCEF also noted that the TMT contract's trading volume represents only a fraction of natural gas trading.

ICE opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to *report* trade data to the CFTC." Furthermore, FIEG cautioned the

[27] The size of the NYMEX Henry Hub physically-delivered natural gas futures contract is 10,000 mmBtu. The TMT contract has a trading unit of 2,500 mmBtu, which is one-quarter the size of the NYMEX Henry Hub contract.

[28] Supplemental data subsequently submitted by the ICE indicated that block trades are included in the on-exchange trades; block trades comprise 63.3 percent of all transactions in the TMT contract.

[29] As noted above, IECA expressed the opinion that the TMT contract met the criteria for SPDC determination but did not provide its reasoning.

[30] 74 FR 52186 (October 9, 2009).

[31] Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

[32] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], * * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." For the reasons discussed above, the Commission has found that the TMT contract does not meet either the price linkage or material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since it cannot be used alone as a basis for a SPDC determination.

[33] As noted above, IECA expressed the opinion that the TMT contract met the criteria for SPDC determination but did not provide its reasoning.

[34] CL 02.

[35] CL 04.

[36] CL 05.

[37] Guidance, *supra.*

[38] CL 08.

[39] CL 06.

Commission in using a reporting threshold as a measure of liquidity. In this regard, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs" [40] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC but this does not mean that the contract will be found to be a SPDC merely because it met the reporting threshold.

ICE and EI proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in *all months of each contract*" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a single traded month or strip of a given contract." [41] A similar argument was made by EI, which observed that the five-trades-per-day number "is highly misleading * * * because the contracts can be offered for as long as 120 months, [thus] the average per day for an individual contract may be less than 1 per day."

It is the Commission's opinion that liquidity, as it pertains to the TMT contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE TMT contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the TMT contract does not meet the material price reference or price linkage criteria, according to the Commission's Guidance, it would be unnecessary to evaluate whether the TM contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission has found that the TMT contract does not meet either the price linkage or material price reference criteria. Accordingly, there is no need to evaluate further the material liquidity criterion since it cannot be used alone as a basis for a SPDC determination.

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the TMT contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA.

Specifically, the Commission has determined that the TMT contract does not meet the material price reference and price linkage criteria at this time. In light of the fact that the Commission has found that the TMT contract does not meet the material price reference or price linkage criteria, according to the Commission's Guidance, it would be unnecessary to evaluate whether the TMT contract meets the material liquidity criterion since it cannot be used alone for SPDC determination. Accordingly, the Commission is issuing the attached Order declaring that the TMT contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its TMT contract.[42] Accordingly, with respect to its TMT contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply with the applicable reporting requirements for ECMs.

IV. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA") [43] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA [44] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act. The Commission has considered the costs and benefits in light of the specific provisions of section 15(a) of the Act and has concluded that the Order, required by Congress to strengthen Federal oversight of exempt commercial markets and to prevent market manipulation, is necessary and appropriate to accomplish the purposes of section 2(h)(7) of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order finding that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which

[40] 73 FR 75892 (December 12, 2008).

[41] In addition, both EI and ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 9, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 63 percent of all transactions in the TMT contract. Commission acknowledges that the open interest information it provided in its October 9, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created. CL 04.

[42] See 73 FR 75888, 75893 (Dec. 12, 2008).

[43] 44 U.S.C. 3507(d).

[44] 7 U.S.C. 19(a).

the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Amendments to section 4(i) of the CEA authorize the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

The Commission has concluded that ICE's TMT contract, which is the subject of the attached Order, is not a SPDC; accordingly, the Commission's Order imposes no additional costs and no additional statutorily or regulatory mandated responsibilities on the ECM.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [45] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect exempt commercial markets. The Commission previously has determined that exempt commercial markets are not small entities for purposes of the RFA.[46] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Order, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

V. Order

Order Relating to the TETCO–M3 Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the TETCO–M3 Financial Basis contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference and price linkage criteria for significant price discovery contracts. In light of the fact that the Commission has found that the TMT contract does not meet the material price reference or price linkage criteria, according to the Commission's Guidance, it would be unnecessary to evaluate whether the TMT contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity [47] with respect to the TETCO–M3 Financial Basis contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the TETCO–M3 Financial Basis contract with the issuance of this Order.

This Order is based on the representations made to the Commission by the IntercontinentalExchange, Inc., dated July 27, 2009, and November 13, 2009, and other supporting material. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its current determination that the TETCO–M3 Financial Basis contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

Issued in Washington, DC, on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–10327 Filed 5–4–10; 8:45 am]

BILLING CODE P

[45] 5 U.S.C. 601 *et seq.*

[46] 66 FR 42256, 42268 (Aug. 10, 2001).

[47] 7 U.S.C. 1a(29).

COMMODITY FUTURES TRADING COMMISSION

Order Finding That the ICE Dominion-South Financial Basis Contract Traded on the IntercontinentalExchange, Inc., Does Not Perform a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final Order.

SUMMARY: On October 9, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the Dominion-South Financial Basis ("DOM") contract, traded on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as a Commission report on ECMs. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue an order finding that the DOM contract does not perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective date:* April 28, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. *Telephone:* (202) 418–5515. *E-mail: gprice@cftc.gov;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. *Telephone:* (202) 418–5133. *E-mail: snathan@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [2] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[3] The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a

[1] 74 FR 52190 (October 9, 2009).

[2] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

[3] 7 U.S.C. 1a(29).

registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[5] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[6]

II. Notice of Intent To Undertake SPDC Determination

On October 9, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the DOM contract performs a significant price discovery function, and requested comment from interested parties.[7] Comments were received from the Industrial Energy Consumers of America ("IECA"), Working Group of Commercial Energy Firms ("WGCEF"), ICE, Platts, Economists Incorporated ("EI"), Federal Energy Regulatory Commission ("FERC"), Natural Gas Suppliers Association ("NGSA") and Financial Institutions Energy Group ("FIEG").[8] The comment letters from FERC[9] and Platts did not directly address the issue of whether or not the DOM contract is a SPDC; IECA concluded that the DOM contract is a SPDC, but did not provide a basis for its conclusion.[10] The other parties' comments raised substantive issues with respect to the applicability of section 2(h)(7) to the DOM contract, generally asserting that the DOM contract is not a SPDC as it does not meet the material price reference, price linkage and material liquidity criteria for SPDC determination. Those comments are more extensively discussed below, as applicable.

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following factors in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.
- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[5] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). *See* also 73 FR 75888, 75894 (Dec. 12, 2008).

[6] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[7] The Commission's Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

[8] IECA describes itself as an "association of leading manufacturing companies" whose membership "represents a diverse set of industries including: plastics, cement, paper, food processing, brick, chemicals, fertilizer, insulation, steel, glass, industrial gases, pharmaceutical, aluminum and brewing." WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." ICE is an ECM, as noted above. McGraw-Hill, through its division Platts, compiles and calculates monthly natural gas price indices from natural gas trade data submitted to Platts by energy marketers. Platts includes those price indices in its monthly *Inside FERC's Gas Market Report* ("Inside FERC"). EI is an economic consulting firm with offices located in Washington, DC, and San Francisco, CA. NGSA is an industry association comprised of natural gas producers and marketers. FERC is an independent federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, "including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors." The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09-018.html.*

[9] FERC stated that the DOM contract is cash settled and does not contemplate actual physical delivery of natural gas. Accordingly, FERC expressed the opinion that a determination by the Commission that a contract performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Natural Gas Act (NGA) over certain sales of natural gas in interstate commerce for resale or with its other regulatory responsibilities under the NGA" and further that, "the FERC staff will continue to monitor for any such conflict * * * [and] advise the CFTC" should any such potential conflict arise. CL 07.

[10] IECA stated that the subject ICE contract should "be required to come into compliance with core principles mandated by Section 2(h)(7) of the Act and with other statutory provisions applicable to registered entities. [This contract] should be subject to the Commission's position limit authority, emergency authority and large trader reporting requirements, among others." CL 01.

commodity are directly based on, or are determined by referencing, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.

• *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[11] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[12] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

[11] In its October 9, 2009, **Federal Register** release, the Commission identified material price reference, price linkage and material liquidity as the possible criteria for SPDC determination of the DOM contract. Arbitrage was not identified as a possible criterion. As a result, arbitrage will not be discussed further in this document and the associated Order.

[12] 17 CFR part 36, Appendix A.

IV. Findings and Conclusions

a. The Dominion-South Financial Basis (DOM) Contract and the SPDC Indicia

The DOM contract is cash settled based on the difference between the bidweek price index for a particular calendar month at the Dominion Transmission, Inc.'s, Appalachia hub, as published in Platts' *Inside FERC's Gas Market Report,* and the final settlement price of the New York Mercantile Exchange's ("NYMEX's") physically-delivered Henry Hub natural gas futures contract for the same calendar month. The Platts bidweek price, which is published monthly, is based on a survey of cash market traders who voluntarily report to Platts data on their fixed-price transactions for physical delivery of natural gas at Dominion Transmission, Inc.'s, Appalachia hub conducted during the last five business days of the month; such bidweek transactions specify the delivery of natural gas on a uniform basis throughout the following calendar month at the agreed upon rate. The Platts bidweek index is published on the first business day of the calendar month in which the natural gas is to be delivered. The size of the DOM contract is 2,500 million British thermal units ("mmBtu"), and the unit of trading is any multiple of 2,500 mmBtu. The DOM contract is listed for up to 72 consecutive calendar months.

The Henry Hub,[13] which is located in Erath, Louisiana, is the primary cash market trading and distribution center for natural gas in the United States. It also is the delivery point and pricing basis for the NYMEX's actively traded Henry Hub physically-delivered natural gas futures contract, which is the most important pricing reference for natural gas in the United States. The Henry Hub, which is operated by Sabine Pipe Line, LLC, serves as a juncture for 13 different pipelines. These pipelines bring in natural gas from fields in the Gulf Coast region and move it to major consumption centers along the East Coast and Midwest. The throughput shipping capacity of the Henry Hub is 1.8 trillion mmBtu per day.

In addition to the Henry Hub, there are a number of other locations where natural gas is traded. In 2008, there were 33 natural gas market centers in North America.[14] Some of the major trading centers include Alberta, Northwest Rockies, Southern California border and the Houston Ship Channel. For locations that are directly connected to the Henry Hub by one or more pipelines and where there typically is adequate shipping capacity, the price at the other locations usually directly tracks the price at the Henry Hub, adjusted for transportation costs. However, at other locations that are not directly connected to the Henry Hub or where shipping capacity is limited, the prices at those locations often diverge from the Henry Hub price. Furthermore, one local price may be significantly different than the price at another location even though the two markets' respective distances from the Henry Hub are the same. The reason for such pricing disparities is that a given location may experience supply and demand factors that are specific to that region, such as differences in pipeline shipping capacity, unusually high or low demand for heating or cooling or supply disruptions caused by severe weather. As a consequence, local natural gas prices can differ from the Henry Hub price by more than the cost of shipping and such price differences can vary in an unpredictable manner.

Dominion Transmission Inc.'s Appalachia hub is a gateway for natural gas flowing from the Midwest bound for the Mid-Atlantic and Northeast markets (excluding New England). According to Platts' methodology, deliveries include those into a transmission line running northeast from Warren County, Ohio, midway between Cincinnati and Dayton, and merges with the second line northeast of Pittsburg, Pennsylvania. The second line runs from Buchanan County, Virginia, on the Virginia/West Virginia border north to the end of the zone at Valley Gate in Armstrong County, Pennsylvania. The major stations in the South Point system include interconnections with ANR Pipeline (Lebanon station), Columbia Gas Transmission (Windbridge and Loudoun stations), Tennessee Gas Pipeline (Cornwell station), Transcontinental Gas Pipe Line (Nokesville station) and Texas Eastern Transmission (Lebanon, Oakford, Chambersburg, Perulack and Windridge stations). Storage pools in the South Point system include South Bend, Murrysville, Oakford, Gamble, Hayden, Webster, Colvin, North Summit, Bridgeport, Lost Creek, Kennedy, Fink and Rocket Newberne.

The Dominion Market Center, which includes the Dominion hub, had an estimated throughput capacity of 2.5 billion cubic feet per day in 2008. Moreover, the number of pipeline interconnections at the Dominion Market Center was 17 in 2008, up from 16 in 2003. Lastly, the pipeline

[13] The term "hub" refers to a juncture where two or more natural gas pipelines are connected. Hubs also serve as pricing points for natural gas.

[14] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

interconnection capacity of the Dominion Market Center in 2008 was 8.3 billion cubic feet per day, which constituted a 42 percent increase over the pipeline interconnection capacity in 2003.[15] The Dominion Market Center is far removed from the Henry Hub but is directly connected to the Henry Hub by an existing pipeline.

In its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as the potential SPDC criteria applicable to the DOM contract. Each of these criteria is discussed below.[16]

1. Material Price Reference Criterion

The Commission's October 9, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers "East Gas End of Day" and "OTC Gas End of Day" with access to all price data or just current prices plus a selected number of months (i.e., 12, 24, 36 or 48 months) of historical data. These two packages include price data for the DOM contract.

The Commission also noted that its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study") [17] found that in general, market participants view the ICE as a price discovery market for certain natural gas contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the DOM contract, while not mentioned by name in the ECM Study, might warrant further study.

The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.[18] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

Following the issuance of the **Federal Register** release, the Commission further evaluated the ICE's data offerings and their use by industry participants. The Dominion Transmission, Inc.'s, Appalachia hub is a significant trading center for natural gas but is not as important as other hubs, such as the Henry Hub, for pricing natural gas in the eastern half of the U.S. marketplace.

Although the Dominion hub is a major trading center for natural gas in the United States and, as noted, ICE sells price information for the DOM contract, the Commission has found upon further evaluation that the cash market transactions are not being directly based or quoted as a differential to the DOM contract nor is that contract routinely consulted by industry participants in pricing cash market transactions and thus does not meet the Commission's Guidance for the material price reference criterion. In this regard, the NYMEX Henry Hub physically delivered natural gas futures contract is routinely consulted by industry participants in pricing cash market transactions at this location. Because both the Dominion hub is directly connected to the Henry Hub via the Gas Transmission interstate pipeline, it is not necessary for market participants to independently refer to the DOM contract for pricing natural gas at this location. Thus, the DOM contract does not satisfy the direct price reference test for existence of material price reference. Furthermore, the Commission has found that the sale by ICE of the DOM contract's prices is not indirect evidence of material price reference. The DOM contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the Dominion hub, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the DOM contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

i. **Federal Register** Comments

As noted above, WGCEF,[19] ICE,[20] EI,[21] NGSA [22] and FIEG [23] addressed the question of whether the DOM contract met the material price reference criterion for a SPDC.[24] The commenters argued that because the DOM contract is cash-settled, it cannot truly serve as an independent "reference price" for transactions in natural gas at this location. Rather, the commenters argue, the underlying cash price series against which the ICE DOM contract is settled (in this case, the Platts bidweek price for natural gas at this location) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too limiting in that it only considers the final index value on which the contract is cash settled after trading ceases. Instead, the Commission believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, the Dominion hub is a significant trading center for natural gas in North America. However, traders do not consider the Dominion hub to be as important as other natural gas trading points, such as the Henry Hub.

ICE argued that the Commission appeared to base the case that the DOM contract is potentially a SPDC on a disputable assertion. In issuing its notice of intent to determine whether

[15] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[16] As noted above, the Commission did not find an indication of arbitrage in connection with this contract; accordingly, that criterion is not discussed in reference to the DOM contract.

[17] *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/pr5403–07_ecmreport.pdf.*

[18] 17 part CFR 36, Appendix A.

[19] CL 02.

[20] CL 04.

[21] CL 05.

[22] CL 06.

[23] CL 08.

[24] As noted above, IECA expressed the opinion that the DOM contract met the criteria for SPDC determination but did not provide its reasoning.

the DOM contract is a SPDC, the CFTC cited a general conclusion in its ECM Study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts." ICE stated that, CFTC's reason is "hard to quantify as the ECM report does not mention" this contract as a potential SPDC. "It is unknown which market participants made this statement *in* 2007 or the contracts that were referenced." [25] In response to the above comment, the Commission notes that it cited the ECM study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets merely as an indicia that an investigation of certain ICE contracts may be warranted, and was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

Both EI [26] and WGCEF [27] stated that publication of price data in a package format is a weak justification for material price reference. These commenters argue that market participants generally do not purchase ICE data sets for one contract's prices, such as those for the DOM contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the DOM prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the DOM prices have substantial value to them. As mentioned above, the Commission has found that the sale by ICE of the DOM contract's prices is not indirect evidence of routine dissemination. The DOM contract's prices are sold as a package with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the Dominion hub, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the DOM contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the DOM contract does not meet the material price reference criterion because cash market transactions are not priced on a frequent and recurring basis at a differential to the DOM contract's price (direct evidence). Moreover, while the ECM sells the DOM contract's price data to market participants, market participants likely do not specifically purchase the ICE data packages for the DOM contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

2. Price Linkage Criterion

In its October 9, 2009, **Federal Register** notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the DOM contract. In this regard, the final settlement of the DOM contract is based, in part, on the final settlement price of the NYMEX's Henry Hub physically-delivered natural gas futures contract, where the NYMEX is registered with the Commission as a DCM.

The Commission's Guidance on Significant Price Discovery Contracts [28] notes that a "price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract." Furthermore, the Guidance notes that "[f]or a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract. The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as, or move substantially in conjunction with, the prices of the referenced contract." The Guidance proposes a threshold price relationship such that prices of the ECM linked contract will fall within a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement or other daily prices over the most recent quarter. Finally, the Commission also stated in the Guidance that it would consider a linked contract that has a trading volume equivalent to 5 percent of the volume of trading in the contract to which it is linked to have sufficient volume potentially to be deemed a SPDC ("minimum threshold").

To assess whether the DOM contract meets the price linkage criterion, Commission staff obtained price data from ICE and performed the statistical tests cited above. Staff found that, while the Dominion-South price is determined, in part, by the final settlement price of the NYMEX physically-delivered natural gas futures contract (a DCM contract), the Dominion-South price is not within 2.5 percent of the settlement price of the corresponding NYMEX Henry Hub natural gas futures contract on 95 percent or more of the days. Specifically, during the third quarter of 2009, 11 percent of the Dominion Transmission, Inc.'s, Appalachia hub natural gas prices derived from the ICE basis values were within 2.5 percent of the daily settlement price of the NYMEX Henry Hub futures contract. In addition, staff finds that the DOM contract fails to meet the volume threshold requirement. In particular, the total trading volume in the NYMEX Natural Gas contract during the third quarter of 2009 was 14,022,963 contracts, with 5 percent of that number being 701,148 contracts. The number of trades on the ICE centralized market in the DOM contract during the same period was 54,107 contracts (equivalent to 13,527 NYMEX contracts, given the size difference).[29] Thus, centralized-market trades in the DOM contract amounted to less than the minimum threshold.

i. **Federal Register** Comments

WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the DOM contract met the price linkage criterion for a SPDC.[30] Each of the commenters expressed the opinion that the DOM contract did not appear to meet the above-discussed Commission guidance regarding the price relationship and/or the minimum volume threshold relative to the DCM contract to which the DOM is linked. Based on its analysis discussed above, the Commission agrees with this assessment.

ii. Conclusion Regarding the Price Linkage Criterion

The Commission finds that the DOM contract does not meet the price linkage criterion because it fails the volume and price linkage tests provided for in the Commission's Guidance.

3. Material Liquidity Factor

As noted above, in its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as potential criteria for SPDC determination of the DOM contract. To

[25] CL 04.

[26] CL 05.

[27] CL 02.

[28] Appendix A to the Part 36 rules.

[29] The DOM contract is one-quarter the size of the NYMEX Henry Hub physically-delivered futures contract.

[30] As noted above, IECA expressed the opinion that the DOM contract met the criteria for SPDC determination but did not provide its reasoning.

assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that the prices of the subject contract potentially may have on prices for other contracts listed on an ECM or a DCM.

Based upon on a required quarterly filing made by ICE on July 27, 2009, the total number of DOM trades executed on ICE's electronic trading platform was 347 in the second quarter of 2009, resulting in a daily average of 5.4 trades. During the same period, the DOM contract had a total trading volume on ICE's electronic trading platform of 38,872 contracts and an average daily trading volume of 607.4 contracts. The open interest as of June 30, 2009, was 97,240 contracts, which includes trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

In a subsequent filing dated November 13, 2009, ICE reported that 460 separate trades occurred on its electronic platform in the third quarter of 2009, resulting in a daily average of 7.0 trades. During the same period, the DOM contract had a total trading volume on its electronic platform of 54,107 contracts (which was an average of 819 contracts per day). As of September 30, 2009, open interest in the DOM contract was 97,213 contracts. Reported open interest included positions resulting from trades that were executed on ICE's electronic platform, as well as trades that were executed off of ICE's electronic platform and brought to ICE for clearing.[31]

As indicated above, the average number of trades per day in the second and third quarters of 2009 was only slightly above the minimum reporting level (5 trades per day). Moreover, trading activity in the DOM contract, as characterized by total quarterly volume, indicates that the DOM contract experiences trading activity similar to that of other thinly-traded contracts.[32] Thus, the DOM contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.[33]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the DOM contract met the material liquidity criterion for a SPDC.[34] These commenters stated that the DOM contract does not meet the material liquidity criterion for SPDC determination for a number of reasons.

WGCEF,[35] ICE[36] and EI[37] noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day, and noted that the relatively low number of trades per day in the DOM contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another."

WGCEF, FIEG[38] and NGSA[39] noted that the DOM contract represents a differential, which does not affect other contracts, including the NYMEX Henry Hub contract and physical gas contracts. FIEG and WGCEF also noted that the DOM contract's trading volume represents only a fraction of natural gas trading.

ICE opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to *report* trade data to the CFTC." Furthermore, FIEG cautioned the Commission in using a reporting threshold as a measure of liquidity. In this regard, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"[40] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC but this does not mean that the contract will be found to be a SPDC merely because it met the reporting threshold.

ICE and EI proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in *all months of each contract*" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a *single* traded month or strip of a given contract."[41] A similar argument was made by EI, which observed that the five-trades-per-day number "is highly misleading * * * because the contracts can be offered for as long as 120 months, [thus] the average per day for an individual contract may be less than 1 per day."

It is the Commission's opinion that liquidity, as it pertains to the DOM contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE DOM contract

[31] Supplemental data supplied by the ICE confirmed that block trades in the third quarter of 2009 were in addition to the trades that were conducted on the electronic platform; block trades comprised 67.4 percent of all transactions in the DOM contract.

[32] Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

[33] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], * * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." For the reasons discussed above, the Commission has found that the DOM contract does not meet either the price linkage or material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since it cannot be used alone as a basis for a SPDC determination.

[34] As noted above, IECA expressed the opinion that the DOM contract met the criteria for SPDC determination but did not provide its reasoning.

[35] CL 02.

[36] CL 04.

[37] CL 05.

[38] CL 08.

[39] CL 06.

[40] 73 FR 75892 (December 12, 2008).

[41] In addition, both EI and ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 9, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 65 percent of all transactions in the DOM contract. The Commission acknowledges that the open interest information it provided in its October 9, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

itself would be considered liquid. In any event, in light of the fact that the Commission has found that the DOM contract does not meet the material price reference or price linkage criteria, according to the Commission's Guidance, it would be unnecessary to evaluate whether the DOM contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission does not find evidence that the DOM contract meets the material liquidity criterion.

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the DOM contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA. Specifically, the Commission has determined that the DOM contract does not meet the material price reference, price linkage and material liquidity criteria at this time. Accordingly, the Commission will issue the attached Order declaring that the DOM contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its DOM contract.[42] Accordingly, with respect to its DOM contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply with the applicable reporting requirements.

V. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")[43] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA[44] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order finding that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Section 4(i) of the CEA authorizes the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

The Commission has concluded that ICE's DOM contract, which is the subject of the attached Order, is not a SPDC; accordingly, the Commission's Order imposes no additional costs and no additional statutorily or regulatory mandated responsibilities on the ECM.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")[45] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect ECMs. The Commission previously has determined that ECMs are not small entities for purposes of the RFA.[46] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these Orders, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

VI. Order

a. Order Relating to the Dominion-South Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Dominion-South Financial Basis contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference, price linkage and material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity[47] with respect to the Dominion-South Financial Basis contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the Dominion-South

[42] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[43] 44 U.S.C. 3507(d).

[44] 7 U.S.C. 19(a).

[45] 5 U.S.C. 601 *et seq.*

[46] 66 FR 42256, 42268 (Aug. 10, 2001).

[47] 7 U.S.C. 1a(29).

Financial Basis contract with the issuance of this Order.

This Order is based on the representations made to the Commission by the IntercontinentalExchange, Inc., dated July 27, 2009, and November 13, 2009, and other supporting material. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its current determination that the Dominion-South Financial Basis contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

Issued in Washington, DC, on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–10332 Filed 5–4–10; 8:45 am]

BILLING CODE P

COMMODITY FUTURES TRADING COMMISSION

Order Finding That the TCO Financial Basis Contract Traded on the IntercontinentalExchange, Inc., Does Not Perform a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final Order.

SUMMARY: On October 9, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the TCO Financial Basis ("TCO") contract traded on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue an order finding that the TCO contract does not perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective Date:* April 28, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [2] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[3] The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[5] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[6]

II. Notice of Intent to Undertake SPDC Determination

On October 9, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the TCO contract performs a significant price discovery function and requested comment from interested parties.[7] Comments were

[1] 74 FR 52200 (October 9, 2009).

[2] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

[3] 7 U.S.C. 1a(29).

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[5] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). See also 73 FR 75888, 75894 (Dec. 12, 2008).

[6] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[7] The Commission's Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to

received from Industrial Energy Consumers of America ("IECA"), Working Group of Commercial Energy Firms ("WGCEF"), Platts, ICE, Economists Incorporated ("EI"), Natural Gas Supply Association ("NGSA"), Federal Energy Regulatory Commission ("FERC") and Financial Institutions Energy Group ("FIEG").[8] The comment letters from FERC[9] and Platts did not directly address the issue of whether or not the TCO contract is a SPDC; IECA expressed the opinion that the TCO contract did perform a significant price discovery function, and thus, should be subject to the requirements of the core principles enumerated in Section 2(h)(7) of the Act, but did not elaborate on its reasons for saying so or directly address any of the criteria. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the TCO contract and generally expressed the opinion that the TCO contract is not a SPDC because it does not meet the material price reference, price linkage, and material liquidity criteria for SPDC determination. These comments are more extensively discussed below, as applicable.

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.
- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.
- *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[10] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[11] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

IV. Findings and Conclusions

a. The TCO Financial Basis (TCO) Contract and the SPDC Indicia

The ICE TCO contract is cash settled based on the difference between the bidweek price of natural gas at the Columbia Gas Transmission, LLC's, Appalachia hub for the contract-specified month of delivery, as published in Platts' *Inside FERC's Gas Market Report,* and the final settlement price of the New York Mercantile Exchange's ("NYMEX's") physically-delivered Henry Hub natural gas futures contract for the same calendar month. The Platts bidweek price, which is published monthly, is based on a survey of cash market traders who voluntarily report to Platts data on their fixed-price transactions conducted during the last five business days of the month for physical delivery of natural gas at the

undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

[8] IECA describes itself as an "association of leading manufacturing companies" whose membership "represents a diverse set of industries including: Plastics, cement, paper, food processing, brick, chemicals, fertilizer, insulation, steel, glass, industrial gases, pharmaceutical, aluminum and brewing." WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." McGraw-Hill, through its division Platts, compiles and calculates monthly natural gas price indices from natural gas trade data submitted to Platts by energy marketers. Platts includes those price indices in its monthly *Inside FERC's Gas Market Report* ("Inside FERC"). ICE is an exempt commercial market, as noted above. EI is an economic consulting firm with offices located in Washington, DC, and San Francisco, CA. NGSA is an industry association comprised of natural gas producers and marketers. FERC is an independent federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, "including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors." The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09–024.html.*

[9] FERC stated that the TCO contract is cash settled and does not contemplate the actual physical delivery of natural gas. Accordingly, FERC expressed the opinion that a determination by the Commission that a contract performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Natural Gas Act (NGA) over certain sales of natural gas in interstate commerce for resale or with its other regulatory responsibilities under the NGA" and further that, "FERC staff will continue to monitor for any such conflict * * * [and] advise the CFTC" should any such potential conflict arise. CL 07.

[10] In its October 9, 2009, **Federal Register** release, the Commission identified material price reference, price linkage and material liquidity as the possible criteria for SPDC determination of the TCO contract. Arbitrage was not identified as a possible criterion. As a result, arbitrage will not be discussed further in this document and the associated Order.

[11] 17 CFR part 36, Appendix A.

Appalachia hub; such bidweek transactions specify the delivery of natural gas on a uniform basis throughout the following calendar month at the agreed upon rate. The Platts bidweek index is published on the first business day of the calendar month in which the natural gas is to be delivered. The size of the TCO contract is 2,500 million British thermal units ("mmBtu"), and the unit of trading is any multiple of 2,500 mmBtu. The TCO contract is listed for up to 72 consecutive calendar months.

The Henry Hub,[12] which is located in Erath, Louisiana, is the primary cash market trading and distribution center for natural gas in the United States. It also is the delivery point and pricing basis for the NYMEX's actively traded, physically-delivered natural gas futures contract, which is the most important pricing reference for natural gas in the United States. The Henry Hub, which is operated by Sabine Pipe Line, LLC, serves as a juncture for 13 different pipelines. These pipelines bring in natural gas from fields in the Gulf Coast region and ship it to major consumption centers along the East Coast and Midwest. The throughput shipping capacity of the Henry Hub is 1.8 trillion mmBtu per day.

In addition to the Henry Hub, there are a number of other locations where natural gas is traded. In 2008, there were 33 natural gas market centers in North America.[13] Some of the major trading centers include Alberta, Northwest Rockies, Southern California border and the Houston Ship Channel. For locations that are directly connected to the Henry Hub by one or more pipelines and where there typically is adequate shipping capacity, the price at the other locations usually directly tracks the price at the Henry Hub, adjusted for transportation costs. However, at other locations that are not directly connected to the Henry Hub or where shipping capacity is limited, the prices at those locations often diverge from the Henry Hub price. Furthermore, one local price may be significantly different than the price at another location even though the two markets' respective distances from the Henry Hub are the same. The reason for such pricing disparities is that a given location may experience supply and demand factors that are specific to that region, such as differences in pipeline shipping capacity, unusually high or low demand for heating or cooling or supply disruptions caused by severe weather. As a consequence, local natural gas prices can differ from the Henry Hub price by more than the cost of shipping and such price differences can vary in an unpredictable manner.

The market area for Columbia Gas Transmission, LLC's, Appalachia hub comprises Eastern Kentucky, West Virginia, Eastern Ohio, Pennsylvania, Northern Virginia and Western New York. Natural gas deliveries into the Columbia Gas Appalachia hub begin downstream of the Leach, Kentucky, interconnection with the Columbia Gulf Transmission interstate pipeline. Columbia Gas Transmission, LLC, operates supply pool and storage facilities in the Northern Appalachia region. The Dominion hub, a market center that includes the TCO hub, had an estimated throughput capacity of 2.5 billion cubic feet per day in 2008. Moreover, the number of pipeline interconnections at the Dominion hub was 17 in 2008, up from 16 in 2003. Lastly, the pipeline interconnection capacity of the Dominion hub in 2008 was 8.3 billion cubic feet per day, which constituted a 42 percent increase over the pipeline interconnection capacity in 2003.[14] The TCO hub is far removed from the Henry Hub but is directly connected to the Henry Hub by the Columbia Gas Transmission interstate pipeline.

The local price at the TCO location typically differs from the price at the Henry Hub. Thus, the price of the Henry Hub physically-delivered futures contract is an imperfect proxy for the TCO price. Moreover, exogenous factors, such as adverse weather, can cause the TCO gas price to differ from the Henry Hub price by an amount that is more or less than the cost of shipping, making the NYMEX Henry Hub futures contract even less precise as a hedging tool than desired by market participants. Basis contracts[15] allow traders to more accurately discover prices at alternative locations and hedge price risk that is associated with natural gas at such locations. In this regard, a position at a local price for an alternative location can be established by adding the appropriate basis swap position to a position taken in the NYMEX physically-delivered Henry Hub contract (or in the NYMEX or ICE Henry Hub look-alike contract, which cash settle based on the NYMEX physically-delivered natural gas contract's final settlement price).

In its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage, and material liquidity as the potential SPDC criteria applicable to the TCO contract. Each of these criteria is discussed below.[16]

1. Material Price Reference Criterion

The Commission's October 9, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "East Gas End of Day" and "OTC Gas End of Day"[17] packages with access to all price data or just current prices plus a selected number of months (i.e., 12, 24, 36 or 48 months) of historical data. These two packages include price data for the TCO contract.

The Commission also noted that its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study")[18] found that in general, market participants view the ICE as a price discovery market for certain natural gas contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the TCO contract, while not mentioned by name in the ECM Study, might warrant further study.

The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.[19] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question.

[12] The term "hub" refers to a juncture where two or more natural gas pipelines are connected. Hubs also serve as pricing points for natural gas at the particular locations.

[13] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[14] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[15] Basis contracts denote the difference in the price of natural gas at a specified location minus the price of natural gas at the Henry Hub. The differential can be either a positive or negative value.

[16] As noted above, the Commission did not find an indication of arbitrage in connection with this contract; accordingly, that criterion was not discussed in reference to the TCO contract.

[17] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

[18] *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/pr5403-07_ecmreport.pdf*

[19] 17 CFR part 36, Appendix A.

Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

Following the issuance of the **Federal Register** release, the Commission further evaluated the ICE's data offerings and their use by industry participants. The Columbia Gas Transmission, LLC's, Appalachia hub is a significant trading center for natural gas but is not as important as other hubs, such as the Henry Hub, for pricing natural gas in the eastern half of the U.S. marketplace.

Although the Appalachia hub is a major trading center for natural gas in the United States and, as noted, ICE sells price information for the TCO contract, the Commission has found upon further evaluation that the cash market transactions are not being directly based or quoted as a differential to the TCO contract nor is that contract routinely consulted by industry participants in pricing cash market transactions and thus does not meet the Commission's Guidance for the material price reference criterion. In this regard, the NYMEX Henry Hub physically delivered natural gas futures contract is routinely consulted by industry participants in pricing cash market transactions at this location. Because both the Appalachia hub is directly connected to the Henry Hub via the Gas Transmission interstate pipeline, it is not necessary for market participants to independently refer to the TCO contract for pricing natural gas at this location. Thus, the TCO contract does not satisfy the direct price reference test for existence of material price reference. Furthermore, the Commission notes that publication of the TCO contract's prices is not indirect evidence material price reference. The TCO contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the Appalachia hub, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the TCO contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the TCO contract met the material price reference criterion for a SPDC.[20] The commenters argued that because the TCO contract is cash-settled, it cannot truly serve as an independent "reference price" for transactions in natural gas at this location. Rather, the commenters argue, the underlying cash price series against which the ICE TCO contract is settled (in this case, the Platts bidweek price for natural gas at this location) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too limiting in that it only considers the final index value on which the contract is cash settled after trading ceases. Instead, the Commission believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, the Appalachia hub is a significant trading center for natural gas in North America. However, traders do not consider the Appalachia hub to be as important as other natural gas trading points, such as the Henry Hub.

ICE[21] also argued that the Commission appeared to base the case that the TCO contract is potentially a SPDC on a disputable assertion. In issuing its notice of intent to determine whether the TCO contract is a SPDC, the CFTC cited a general conclusion in its ECM Study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts." ICE states that CFTC's reason is "hard to quantify as the ECM report does not mention" this contract as a potential SPDC. "It is unknown which market participants made this statement in 2007 or the contracts that were referenced." In response to the above comment, the Commission notes that it cited the ECM study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets merely as an indicia that an investigation of certain ICE contracts may be warranted, and was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

Both EI[22] and WGCEF[23] stated that publication of price data in a package format is a weak justification for material price reference. These commenters argue that market participants generally do not purchase ICE data sets for one contract's prices, such as those for the TCO contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the TCO prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the TCO prices have substantial value to them. As mentioned above, the Commission notes that publication of the TCO contract's prices is not indirect evidence of routine dissemination. The TCO contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the Appalachia hub, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the TCO contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the TCO contract does not meet the material price reference criterion because cash market transactions are not priced either explicitly or implicitly on a frequent and recurring basis at a differential to the TCO contract's price (direct evidence). Moreover, while the ECM sells the TCO contract's price data to market participants, market participants likely do not specifically purchase the ICE data packages for the TCO contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

[20] As noted above, IECA expressed the opinion that the TCO contract met the criteria for SPDC determination but did not provide its reasoning.

[21] CL 04.

[22] CL 05.

[23] CL 02.

2. Price Linkage Criterion

In its October 9, 2009, **Federal Register** notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the TCO contract. In this regard, the final settlement of the TCO contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas futures contract, where the NYMEX is registered with the Commission as a DCM.

The Commission's Guidance on Significant Price Discovery Contracts [24] notes that a "price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract." Furthermore, the Guidance notes that, "[f]or a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract. The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract." Furthermore, the Guidance proposes a threshold price relationship such that prices of the ECM linked contract will fall within a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement or other daily prices over the most recent quarter. Finally, in Guidance the Commission stated that it would consider a linked contract that has a trading volume equivalent to 5 percent of the volume of trading in the contract to which it is linked to have sufficient volume to be deemed a SPDC ("minimum threshold").

To assess whether the TCO contract meets the price linkage criterion, Commission staff obtained price data from ICE and performed the statistical tests cited above. Staff found that, while the TCO contract price is determined, in part, by the final settlement price of the NYMEX physically-delivered natural gas futures contract (a DCM contract), the imputed TCO location price (derived by adding the NYMEX Henry Hub Natural Gas price to the ICE TCO basis price) is not within 2.5 percent of the settlement price of the corresponding NYMEX Henry Hub natural gas futures contract on 95 percent or more of the days. Specifically, during the third quarter of 2009, only 13.3 percent of the TCO natural gas prices derived from the ICE basis values were within 2.5 percent of the daily settlement price of the NYMEX Henry Hub futures contract. In addition, staff found that the TCO contract fails to meet the volume threshold requirement. In particular, the total trading volume in the NYMEX Natural Gas contract during the third quarter of 2009 was 14,022,963 contracts, with 5 percent of that number being 701,148 contracts. Trades on the ICE centralized market in the TCO contract during the same period was 60,106 contracts (equivalent to 15,026 NYMEX contracts, given the size difference).[25] Thus, centralized-market trades in the TCO contract amounted to less than the minimum threshold.[26]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the TCO contract met the price linkage criterion for a SPDC.[27] Each of the commenters expressed the opinion that the TCO contract did not appear to meet the above-discussed Commission guidance regarding the price relationship and/or the minimum volume threshold relative to the DCM contract to which the TCO is linked. Based on its analysis discussed above, the Commission agrees with this assessment.

ii. Conclusion Regarding the Price Linkage Criterion

Based on the above, the Commission finds that the TCO contract does not meet the price linkage criterion because it fails the price relationship and volume tests provided for in the Commission's Guidance.

3. Material Liquidity Criterion

As noted above, in its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as potential criteria for SPDC determination of the TCO contract. To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that the prices of the subject contract potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE's electronic platform in the TCO contract was 583 in the second quarter of 2009, resulting in a daily average of 9.1 trades. During the same period, the TCO contract had a total trading volume of 61,944 contracts and an average daily trading volume of 968 contracts. Moreover, open interest as of June 30, 2009, was 141,544 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.[28]

In a subsequent filing dated November 13, 2009, ICE reported that total trading volume in the third quarter of 2009 was 60,106 contracts (or 911 contracts on a daily basis). In term of number of transactions, 411 trades occurred in the third quarter of 2009 (6.2 trades per day). As of September 30, 2009, open interest in the TCO contract was 154,006 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

As indicated above, the average number of trades per day in the second and third quarters of 2009 was only slightly above the minimum reporting level (5 trades per day). Moreover, trading activity in the TCO contract, as characterized by total quarterly volume, indicates that the TCO contract experiences trading activity similar to that of other thinly-traded contracts.[29] Thus, the TCO contract does not meet a threshold of trading activity that

[24] Appendix A to the Part 36 rules.

[25] The size of the NYMEX Henry Hub physically-delivered natural gas futures contract is 10,000 mmBtu. The TCO contract has a trading unit of 2,500 mmBtu, which is one-quarter the size of the NYMEX Henry Hub contract.

[26] Supplemental data subsequently submitted by the ICE indicated that block trades are in addition the on-exchange trades; block trades comprise 61.1 percent of all transactions in the TCO contract.

[27] As noted above, IECA expressed the opinion that the TCO contract met the criteria for SPDC determination but did not provide its reasoning.

[28] 74 FR 52200 (October 9, 2009).

[29] Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

would render it of potential importance and no additional statistical analysis is warranted.[30]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the TCO contract met the material liquidity criterion for a SPDC.[31] These commenters stated that the TCO contract does not meet the material liquidity criterion for SPDC determination for a number of reasons.

WGCEF,[32] ICE[33] and EI[34] noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day, and noted that the relatively low number of trades per day in the TCO contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another."

WGCEF, FIEG[35] and NGSA[36] noted that the TCO contract represents a differential, which does not affect other contracts, including the NYMEX Henry Hub contract and physical gas contracts. FIEG and WGCEF also noted that the TCO contract's trading volume represents only a fraction of natural gas trading.

ICE opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to report trade data to the CFTC." Furthermore, FIEG cautioned the Commission in using a reporting threshold as a measure of liquidity. In this regard, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"[37] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC but this does not mean that the contract will be found to be a SPDC merely because it met the reporting threshold.

ICE and EI proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all months of each contract" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a single traded month or strip of a given contract."[38] A similar argument was made by EI, which observed that the five-trades-per-day number "is highly misleading * * * because the contracts can be offered for as long as 120 months, [thus] the average per day for an individual contract may be less than 1 per day."

It is the Commission's opinion that liquidity, as it pertains to the TCO contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE TCO contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the TCO contract does not meet the material price reference or price linkage criteria, according to the Commission's Guidance, it would be unnecessary to evaluate whether the TCO contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission has found that the TCO contract does not meet the material liquidity criterion.

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the TCO contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA.

Specifically, the Commission has determined that the TCO contract does not meet the material price reference, price linkage, or material liquidity criteria at this time. Accordingly, the Commission will issue the attached Order declaring that the TCO contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its TCO contract.[39] Accordingly, with respect to its TCO contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply with the applicable reporting requirements.

IV. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")[40] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA[41] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms,

[30] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], * * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." For the reasons discussed above, the Commission has found that the TCO contract does not meet either the price linkage or material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since it cannot be used alone as a basis for a SPDC determination.

[31] As noted above, IECA expressed the opinion that the TCO contract met the criteria for SPDC determination but did not provide its reasoning.

[32] CL 02.

[33] CL 04.

[34] CL 05.

[35] CL 08.

[36] CL 06.

[37] 73 FR 75892 (December 12, 2008).

[38] In addition, both EI and ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 9, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 60 percent of all transactions in the TCO contract. The Commission acknowledges that the open interest information it provided in its October 9, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

[39] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[40] 44 U.S.C. 3507(d).

[41] 7 U.S.C. 19(a).

section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act. The Commission has considered the costs and benefits in light of the specific provisions of section 15(a) of the Act and has concluded that the Order, required by Congress to strengthen federal oversight of exempt commercial markets and to prevent market manipulation, is necessary and appropriate to accomplish the purposes of section 2(h)(7) of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order finding that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Amendments to section 4(i) of the CEA authorize the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

The Commission has concluded that ICE's TCO contract, which is the subject of the attached Order, is not a SPDC; accordingly, the Commission's Order imposes no additional costs and no additional statutorily or regulatory mandated responsibilities on the ECM.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [42] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect exempt commercial markets. The Commission previously has determined that exempt commercial markets are not small entities for purposes of the RFA.[43] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Order, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

V. Order

a. Order Relating to the TCO Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the TCO Financial Basis contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference, price linkage, and material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity [44] with respect to the TCO Financial Basis contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the TCO Financial Basis contract with the issuance of this Order.

This Order is based on the representations made to the Commission by the IntercontinentalExchange, Inc., dated July 27, 2009, and November 13, 2009, and other supporting material. Any material change or omissions in the facts and circumstances pursuant to which this Order is granted might require the Commission to reconsider its current determination that the TCO Financial Swing contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

Issued in Washington, DC, on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–10338 Filed 5–4–10; 8:45 am]

BILLING CODE 6351–01–P

[42] 5 U.S.C. 601 *et seq.*

[43] 66 FR 42256, 42268 (Aug. 10, 2001).

[44] 7 U.S.C. 1a(29).

COMMODITY FUTURES TRADING COMMISSION

Order Finding That the Zone 6–NY Financial Basis Contract Traded on the IntercontinentalExchange, Inc., Does Not Perform a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: On October 9, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the Zone 6–NY Financial Basis ("TZS") contract traded on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue an order finding that the TZS contract

[1] 74 FR 52204 (October 9, 2009).

does not perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective Date:* April 28, 2010.

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SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [2] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[3] The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[5] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[6]

II. Notice of Intent To Undertake SPDC Determination

On October 9, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the TZS contract performs a significant price discovery function and requested comment from interested parties.[7] Comments were received from Industrial Energy Consumers of America ("IECA"), Working Group of Commercial Energy Firms ("WGCEF"), Platts, ICE, Economists Incorporated ("EI"), Natural Gas Supply Association ("NGSA"), Federal Energy Regulatory Commission ("FERC") and Financial Institutions Energy Group ("FIEG").[8] The comment letters from FERC [9] and Platts did not directly address the issue of whether or not the TZS contract is a SPDC; IECA expressed the opinion that the TZS contract did perform a significant price discovery function; and thus, should be subject to the requirements of the core principles enumerated in Section 2(h)(7) of the Act, but did not elaborate on its reasons for saying so or directly address any of the criteria. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the TZS contract

[2] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law No. 110–246, 122 Stat. 1624 (June 18, 2008).

[3] 7 U.S.C. 1a(29).

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[5] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). *See* also 73 FR 75888, 75894 (Dec. 12, 2008).

[6] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[7] The Commission's part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

[8] IECA describes itself as an "association of leading manufacturing companies" whose membership "represents a diverse set of industries including: plastics, cement, paper, food processing, brick, chemicals, fertilizer, insulation, steel, glass, industrial gases, pharmaceutical, aluminum and brewing." WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." McGraw-Hill, through its division Platts, compiles and calculates monthly natural gas price indices from natural gas trade data submitted to Platts by energy marketers. Platts includes those price indices in its monthly *Inside FERC's Gas Market Report* ("Inside FERC"). ICE is an exempt commercial market, as noted above. EI is an economic consulting firm with offices located in Washington, DC, and San Francisco, CA. NGSA is an industry association comprised of natural gas producers and marketers. FERC is an independent federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, "including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors." The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09–015.html.*

[9] FERC stated that the TZS contract is cash settled and does not contemplate the actual physical delivery of natural gas. Accordingly, FERC expressed the opinion that a determination by the Commission that a contract performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Natural Gas Act (NGA) over certain sales of natural gas in interstate commerce for resale or with its other regulatory responsibilities under the NGA" and further that, "FERC staff will continue to monitor for any such conflict * * * [and] advise the CFTC" should any such potential conflict arise. CL 07.

and generally expressed the opinion that the TZS contract is not a SPDC because it does not meet the material price reference, price reference and material liquidity criteria for SPDC determination. These comments are more extensively discussed below, as applicable.

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.
- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.
- *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[10] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[11] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

IV. Findings and Conclusions

a. The Zone 6–NY Financial Basis (TZS) Contract and the SPDC Indicia

The TZS contract is cash settled based on the difference between the bidweek price index for a particular calendar month at the Transcontinental Gas Pipe Line's ("Transco's") Zone 6 hub, as published in Platts' *Inside FERC's Gas Market Report,* and the final settlement price of the New York Mercantile Exchange's ("NYMEX's") physically-delivered Henry Hub natural gas futures contract for the same calendar month. The Platts bidweek price, which is published monthly, is based on a survey of cash market traders who voluntarily report to Platts data on fixed-price transactions for physical delivery of natural gas at Transco's Zone 6 hub[12] conducted during the last five business days of the month; such bidweek transactions specify the delivery of natural gas on a uniform basis throughout the following calendar month at the agreed upon rate. The Platt's bidweek index is published on the first business day of the calendar month in which the natural gas is to be delivered. The size of the TZS contract is 2,500 million British thermal units ("mmBtu"), and the unit of trading is any multiple of 2,500 mmBtu. The TZS contract is listed for up to 72 calendar months commencing with the next calendar month.

The Henry Hub,[13] which is located in Erath, Louisiana, is the primary cash market trading and distribution center for natural gas in the United States. It also is the delivery point and pricing basis for the NYMEX's actively traded, physically-delivered natural gas futures contract, which is the most important pricing reference for natural gas in the United States. The Henry Hub, which is operated by Sabine Pipe Line, LLC, serves as a juncture for 13 different pipelines. These pipelines bring in natural gas from fields in the Gulf Coast region and ship it to major consumption centers along the East Coast and Midwest. The throughput shipping capacity of the Henry Hub is 1.8 trillion mmBtu per day.

In addition to the Henry Hub, there are a number of other locations where natural gas is traded. In 2008, there were 33 natural gas market centers in North America.[14] Some of the major trading centers include Alberta, Northwest Rockies, Southern California border and the Houston Ship Channel. For locations that are directly connected to the Henry Hub by one or more pipelines and where there typically is adequate shipping capacity, the price at the other locations usually directly tracks the price at the Henry Hub, adjusted for transportation costs. However, at other locations that are not directly connected to the Henry Hub or where shipping capacity is limited, the prices at those locations often diverge from the Henry Hub price. Furthermore, one local price may be significantly different than the price at another location even though the two markets' respective distances

[10] In its October 9, 2009, **Federal Register** release, the Commission identified material price reference, price linkage and material liquidity as the possible criteria for SPDC determination of the TZS contract. Arbitrage was not identified as a possible criterion. As a result, arbitrage will not be discussed further in this document and the associated Order.

[11] 17 CFR part 36, Appendix A.

[12] For the Transco Zone 6 hub, Platts includes natural gas deliveries from Transco at the end of Zone 6 into citygates downstream of Linden, N.J., for New York City area distributors—KeySpan Energy Delivery and Consolidated Edison Co. of New York—as well as Public Service Electric and Gas of New Jersey.

[13] The term "hub" refers to a juncture where two or more natural gas pipelines are connected. Hubs also serve as pricing points for natural gas at the particular locations.

[14] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

from the Henry Hub are the same. The reason for such pricing disparities is that a given location may experience supply and demand factors that are specific to that region, such as differences in pipeline shipping capacity, unusually high or low demand for heating or cooling or supply disruptions caused by severe weather. As a consequence, local natural gas prices can differ from the Henry Hub price by more than the cost of shipping and such price differences can vary in an unpredictable manner.

Transco operates an interstate pipeline system, which transports large volumes of natural gas from Henry Hub to the East Coast. Zone 6 refers to a 300-mile portion of the pipeline system that extends from Northern Virginia to New York City.[15] The Dominion Market Center, which includes Transco's Zone 6 hub, covers the entire Dominion Transmission Company pipeline grid, which has operations in Pennsylvania, New York, and Ohio; it also has access to 15 storage fields located on the Dominion system. The Dominion Market Center had an estimated throughput capacity of 2.5 billion cubic feet per day in 2008. Moreover, the total number of pipeline interconnections at the Dominion Market Center was 17 in 2008, up from 16 in 2003. Lastly, the pipeline interconnection capacity of the Dominion Market Center in 2008 was 8.3 billion cubic feet per day, which constituted a 42 percent increase over the pipeline interconnection capacity in 2003.[16] A major operational area of the Dominion Market Center is the Leidy area of north central Pennsylvania, a region of major pipeline connectivity in the Northeast. A number of major interstate pipelines traverse the general area, including the Tennessee Gas Pipeline, Texas Eastern Transmission Pipeline and Transco, all of which are interconnected through the Dominion Market Center.[17] The Dominion Market Center is far removed from the Henry Hub but is directly connected to the Henry Hub by an existing pipeline.

The local price at Transco's Zone 6 hub typically differs from the price at the Henry Hub. Thus, the price of the Henry Hub physically-delivered futures contract is an imperfect proxy for the TZS contract's price. Moreover, exogenous factors, such as adverse weather, can cause the Zone 6 gas price to differ from the Henry Hub price by an amount that is more or less than the cost of shipping, making the NYMEX Henry Hub futures contract even less precise as a hedging tool than desired by market participants. Basis contracts[18] allow traders to more accurately discover prices at alternative locations and hedge price risk that is associated with natural gas at such locations. In this regard, a position at a local price for an alternative location can be established by adding the appropriate basis swap position to a position taken in the NYMEX physically-delivered Henry Hub contract (or in the NYMEX or ICE Henry Hub look-alike contract, which cash settle based on the NYMEX physically-delivered natural gas contract's final settlement price).

In its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage, and material liquidity as the potential SPDC criteria applicable to the TZS contract. Each of these criteria is discussed below.[19]

1. Material Price Reference Criterion

The Commission's October 9, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "East Gas End of Day" and "OTC Gas End of Day"[20] packages with access to all price data or just current prices plus a selected number of months (*i.e.,* 12, 24, 36 or 48 months) of historical data. These two packages include price data for the TZS contract.

The Commission also noted that its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study")[21] found that in general, market participants view the ICE as a price discovery market for certain natural gas contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the TZS contract, while not mentioned by name in the ECM Study, might warrant further study. Following the issuance of the **Federal Register** release, the Commission further evaluated the ICE's data offerings and their use by industry participants. Transco's Zone 6 hub is a significant trading center for natural gas but is not as important as other hubs, such as the Henry Hub, for pricing natural gas in the eastern half of the U.S. marketplace.

The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.[22] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

Although Transco's Zone 6 hub is a major trading center for natural gas in the United States and, as noted, ICE sells price information for the TZS contract, the Commission has found upon further evaluation that the cash market transactions are not being directly based or quoted as a differential to the TZS contract nor is that contract routinely consulted by industry

[15] Brown, S. P.A. and M. K. Yücel. "Deliverability and regional pricing in U.S. natural gas markets." *Energy Economics* 30(2008): 2441–2453.

[16] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[17] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[18] Basis contracts denote the difference in the price of natural gas at a specified location minus the price of natural gas at the Henry Hub. The differential can be either a positive or negative value.

[19] As noted above, the Commission did not find an indication of arbitrage in connection with this contract; accordingly, that criterion was not discussed in reference to the TZS contract.

[20] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

[21] *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/pr5403-07_ecmreport.pdf*

[22] 17 CFR part 36, Appendix A.

participants in pricing cash market transactions. In this regard, liquidity constraints caused by severe winter weather on peak days may create pricing complications for cash market participants. Thus, the TZS contract does not satisfy the direct price reference test for existence of material price reference. In contrast, NYMEX's Henry Hub physically/delivered natural gas futures contract is routinely consulted by industry participants in pricing cash market transactions. Furthermore, the Commission notes that publication of the TZS contract's prices is not indirect evidence of material price reference. The TZS contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of Transco's Zone 6 hub, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the TZS contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

i. **Federal Register** Comments

As noted above, WGCEF,[23] ICE,[24] EI,[25] NGSA [26] and FIEG [27] addressed the question of whether the TZS contract met the material price reference criterion for a SPDC.[28] The commenters argued that because the TZS contract is cash-settled, it cannot truly serve as an independent "reference price" for transactions in natural gas at this location. Rather, the commenters argue, the underlying cash price series against which the ICE TZS contract is settled (in this case, the Platts bidweek price for natural gas at this location) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too limiting in that it only considers the final index value on which the contract is cash settled after trading ceases. Instead, the Commission believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, Transco's Zone 6 is a significant trading center for natural gas in North America. However, traders do not consider it to be as important as other natural gas trading points, such as the Henry Hub.

ICE also argued that the Commission appeared to base the case that the TZS contract is potentially a SPDC on a disputable assertion. In issuing its notice of intent to determine whether the TZS contract is a SPDC, the CFTC cited a general conclusion in its ECM Study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts." ICE stated that, CFTC's reason is "hard to quantify as the ECM report does not mention" this contract as a potential SPDC. "It is unknown which market participants made this statement in 2007 or the contracts that were referenced." [29] In response to the above comment, the Commission notes that it cited the ECM study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets merely as an indicia that an investigation of certain ICE contracts may be warranted, and was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

Both EI [30] and WGCEF [31] stated that publication of price data in a package format is a weak justification for material price reference. These commenters argue that market participants generally do not purchase ICE data sets for one contract's prices, such as those for the TZS contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the TZS prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the TZS prices have substantial value to them. As mentioned above, the Commission notes that publication of the TZS contract's prices is not indirect evidence of routine dissemination. The TZS contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of Transco's Zone 6 hub, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the TZS contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the TZS contract does not meet the material price reference criterion because cash market transactions are not priced on a frequent and recurring basis at a differential to the TZS contract's price (direct evidence). Moreover, while the ECM sells the TZS contract's price data to market participants, market participants likely do not specifically purchase the ICE data packages for the TZS contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

2. Price Linkage Criterion

In its October 9, 2009, **Federal Register** notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the TZS contract. In this regard, the final settlement of the TZS contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas futures contract, where the NYMEX is registered with the Commission as a DCM.

The Commission's Guidance on Significant Price Discovery Contracts [32] notes that a "price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract." Furthermore, the Guidance notes that, "[f]or a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract. The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract." Furthermore, the Guidance proposes a threshold price relationship such that prices of the ECM linked contract will fall within a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement or other daily prices over the most recent quarter. Finally, in Guidance the Commission stated that it would consider a linked contract that

[23] CL 02.

[24] CL 04.

[25] CL 05.

[26] CL 06.

[27] CL 08.

[28] As noted above, IECA expressed the opinion that the TZS contract met the criteria for SPDC determination but did not provide its reasoning.

[29] CL 04.

[30] CL 05.

[31] CL 02.

[32] Appendix A to the Part 36 rules.

has a trading volume equivalent to 5 percent of the volume of trading in the contract to which it is linked to have sufficient volume to be deemed a SPDC ("minimum threshold").

To assess whether the TZS contract meets the price linkage criterion, Commission staff obtained price data from ICE and performed the statistical tests cited above. Staff found that, while the TZS contract price is determined, in part, by the final settlement price of the NYMEX physically-delivered natural gas futures contract (a DCM contract), the imputed Zone 6 gas price (derived by adding the NYMEX Henry Hub Natural Gas price to the ICE TZS contract's price) is not within 2.5 percent of the settlement price of the corresponding NYMEX Henry Hub natural gas futures contract on 95 percent or more of the days. Specifically, during the third quarter of 2009, none of the TZS natural gas prices derived from the ICE basis values were within 2.5 percent of the daily settlement price of the NYMEX Henry Hub futures contract. In addition, staff found that the TZS contract fails to meet the volume threshold requirement. In particular, the total trading volume in the NYMEX Natural Gas contract during the third quarter of 2009 was 14,022,963 contracts, with 5 percent of that number being 701,148 contracts. Trades on the ICE centralized market in the TZS contract during the same period was 87,692 contracts (equivalent to 21,923 NYMEX contracts, given the size difference).[33] Thus, centralized-market trades in the TZS contract amounted to less than the minimum threshold.[34]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the TZS contract met the price linkage criterion for a SPDC.[35] Each of the commenters expressed the opinion that the TZS contract did not appear to meet the above-discussed Commission guidance regarding the price relationship and/or the minimum volume threshold relative to the DCM contract to which the TZS is linked. Based on its analysis discussed above, the Commission agrees with this assessment.

ii. Conclusion Regarding the Price Linkage Criterion

Based on the above, the Commission finds that the TZS contract does not meet the price linkage criterion because it fails the price relationship and volume tests provided for in the Commission's Guidance.

3. Material Liquidity Criterion

As noted above, in its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as potential criteria for SPDC determination of the TZS contract. To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that the prices of the subject contract potentially may have on prices for other contracts listed on an ECM or a DCM.

Based on a required quarterly filing made by ICE on July 27, 2009, the total number of TZS trades executed on ICE's electronic trading platform was 552 in the second quarter of 2009, resulting in a daily average of 8.6 trades. During the same period, the TZS contract had a total trading volume on ICE's electronic trading platform of 55,371 contracts and an average daily trading volume of 865.2 contracts. The open interest as of June 30, 2009, was 87,520 contracts, which includes trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

In a subsequent filing dated November 13, 2009, ICE reported that 957 separate trades occurred on its electronic platform in the third quarter of 2009, resulting in a daily average of 14.5 trades. During the same period, the TZS contract had a total trading volume on its electronic platform of 87,692 contracts (which was an average of 1,329 contracts per day). As of September 30, 2009, open interest in the TZS contract was 83,623 contracts. Reported open interest included positions resulting from trades that were executed on ICE's electronic platform, as well as trades that were executed off of ICE's electronic platform and brought to ICE for clearing.[36]

As indicated above, the average number of trades per day in the second and third quarters of 2009 was only slightly above the minimum reporting level (5 trades per day). Moreover, trading activity in the TZS contract, as characterized by total quarterly volume, indicates that the TZS contract experiences trading activity similar to that of other thinly-traded contracts.[37] Thus, the TZS contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.[38]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the TZS contract met the material liquidity criterion for a SPDC.[39] These commenters stated that the TZS contract does not meet the material liquidity criterion for SPDC determination for a number of reasons.

WGCEF,[40] ICE[41] and EI[42] noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day, and noted that the relatively low number of trades per day in the TZS contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain

[33] The size of the NYMEX Henry Hub physically-delivered natural gas futures contract is 10,000 mmBtu. The TZS contract has a trading unit of 2,500 mmBtu, which is one-quarter the size of the NYMEX Henry Hub contract.

[34] Supplemental data subsequently submitted by the ICE indicated that block trades are included in the on-exchange trades; block trades comprise 54 percent of all transactions in the TZS contract.

[35] As noted above, IECA expressed the opinion that the TZS contract met the criteria for SPDC determination but did not provide its reasoning.

[36] Supplemental data supplied by the ICE confirmed that block trades in the third quarter of 2009 were in addition to the trades that were conducted on the electronic platform; block trades comprised 53.9 percent of all transactions in the DOM contract.

[37] Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

[38] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], * * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." For the reasons discussed above, the Commission has found that the TZS contract does not meet either the price linkage or material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since it cannot be used alone as a basis for a SPDC determination.

[39] As noted above, IECA expressed the opinion that the TZS contract met the criteria for SPDC determination but did not provide its reasoning.

[40] CL 02.

[41] CL 04.

[42] CL 05.

markets, but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another."

WGCEF, FIEG [43] and NGSA [44] noted that the TZS contract represents a differential, which does not affect other contracts, including the NYMEX Henry Hub contract and physical gas contracts. FIEG and WGCEF also noted that the TZS contract's trading volume represents only a fraction of natural gas trading.

ICE opined that the Commission "seems to have adopted a five-trades-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five-trades-per-day threshold as the basis for an ECM to *report* trade data to the CFTC." Furthermore, FIEG cautioned the Commission in using a reporting threshold as a measure of liquidity. In this regard, the Commission adopted a five-trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs" [45] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC but this does not mean that the contract will be found to be a SPDC merely because it met the reporting threshold.

ICE and EI proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in *all months of each contract*" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a *single* traded month or strip of a given contract." [46] A similar argument was made by EI, which observed that the five-trades-per-day number "is highly misleading * * * because the contracts can be offered for as long as 120 months, [thus] the average per day for an individual contract may be less than 1 per day."

It is the Commission's opinion that liquidity, as it pertains to the TZS contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE TZS contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the TZS contract does not meet the material price reference or price linkage criteria, according to the Commission's Guidance, it would be unnecessary to evaluate whether the TZS contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission does not find evidence that the TZS contract meets the material liquidity criterion.

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the TZS contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA. Specifically, the TZS contract does not meet the material price reference, price linkage and material liquidity criteria for SPDC determination. Accordingly, the Commission will issue the attached Order declaring that the TZS contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its TZS contract.[47] Accordingly, with respect to its TZS contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply with the applicable reporting requirements.

IV. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA") [48] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA [49] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act. The Commission has considered the costs and benefits in light of the specific provisions of section 15(a) of the Act and has concluded that the Order, required by Congress to strengthen Federal oversight of exempt commercial markets and to prevent market manipulation, is necessary and appropriate to accomplish the purposes of section 2(h)(7) of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price

[43] CL 08.

[44] CL 06.

[45] 73 FR 75892 (December 12, 2008).

[46] In addition, both EI and ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 9, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 54 percent of all transactions in the TZS contract. The Commission acknowledges that the open interest information it provided in its October 9, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

[47] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[48] 44 U.S.C. 3507(d).

[49] 7 U.S.C. 19(a).

manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order fining that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Amendments to section 4(i) of the CEA authorize the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

The Commission has concluded that ICE's TZS contract, which is the subject of the attached Order, is not a SPDC; accordingly, the Commission's Order imposes no additional costs and no additional statutorily or regulatory mandated responsibilities on the ECM.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [50] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect exempt commercial markets. The Commission previously has determined that exempt commercial markets are not small entities for purposes of the RFA.[51] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Order, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

V. Order

a. Order Relating to the Zone 6-NY Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Zone 6-NY Financial Basis contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference, price linkage and material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity [52] with respect to the TZS Financial Basis contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the Zone 6-NY Financial Basis contract with the issuance of this Order.

This Order is based on the representations made to the Commission by the IntercontinentalExchange, Inc., dated July 27, 2009, and November 13, 2009, and other supporting material. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its current determination that the Zone 6-NY Financial Basis contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

Issued in Washington, DC, on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–10575 Filed 5–4–10; 8:45 am]

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[50] 5 U.S.C. 601 *et seq.*

[51] 66 FR 42256, 42268 (Aug. 10, 2001).

[52] 7 U.S.C. 1a(29).

COMMODITY FUTURES TRADING COMMISSION

Order Finding That the Permian Financial Basis Contract Traded on the IntercontinentalExchange, Inc., Does Not Perform a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final Order.

SUMMARY: On October 9, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the Permian Financial Basis ("PER") contract traded on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue an order finding that the PER contract does not perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective date:* April 28, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [2] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price

[1] 74 FR 52194 (October 9, 2009).

[2] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[3] The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[5] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[6]

II. Notice of Intent To Undertake SPDC Determination

On October 9, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the PER contract performs a significant price discovery function and requested comment from interested parties.[7] Comments were received from Industrial Energy Consumers of America ("IECA"), Working Group of Commercial Energy Firms ("WGCEF"), Platts, ICE, Economists Incorporated ("EI"), Natural Gas Supply Association ("NGSA"), Federal Energy Regulatory Commission ("FERC") and Financial Institutions Energy Group ("FIEG").[8] The comment letters from FERC[9] and Platts did not directly address the issue of whether or not the PER contract is a SPDC; IECA expressed the opinion that the PER contract did perform a significant price discovery function; and thus, should be subject to the requirements of the core principles enumerated in Section 2(h)(7) of the Act, but did not elaborate on its reasons for saying so or directly address any of the criteria. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the PER contract and generally expressed the opinion that the PER contract is not a SPDC because it does not meet the price linkage, material price reference and material liquidity criteria for SPDC determination. These comments are more extensively discussed below, as applicable.

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or

[3] 7 U.S.C. 1a(29).

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[5] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). See also 73 FR 75888, 75894 (Dec. 12, 2008).

[6] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[7] The Commission's Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

[8] IECA describes itself as an "association of leading manufacturing companies" whose membership "represents a diverse set of industries including: Plastics, cement, paper, food processing, brick, chemicals, fertilizer, insulation, steel, glass, industrial gases, pharmaceutical, aluminum and brewing." WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." McGraw-Hill, through its division Platts, compiles and calculates monthly natural gas price indices from natural gas trade data submitted to Platts by energy marketers. Platts includes those price indices in its monthly *Inside FERC's Gas Market Report* ("Inside FERC"). ICE is an exempt commercial market, as noted above. EI is an economic consulting firm with offices located in Washington, DC, and San Francisco, CA. NGSA is an industry association comprised of natural gas producers and marketers. FERC is an independent federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, "including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors." The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09-022.html.*

[9] FERC stated that the PER contract is cash settled and does not contemplate the actual physical delivery of natural gas. Accordingly, FERC expressed the opinion that a determination by the Commission that a contract performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Natural Gas Act (NGA) over certain sales of natural gas in interstate commerce for resale or with its other regulatory responsibilities under the NGA" and further that, "FERC staff will continue to monitor for any such conflict * * * [and] advise the CFTC" should any such potential conflict arise. CL 07.

transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.

• *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.

• *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[10] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[11] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

IV. Findings and Conclusions

a. The Permian Financial Basis (PER) Contract and the SPDC Indicia

The Permian Financial Basis (PER) contract is cash settled based on the difference between the bidweek price index for a particular calendar month at El Paso Natural Gas Company's Permian Basin, as published in Platts' *Inside FERC's Gas Market Report,* and the final settlement price of the New York Mercantile Exchange's ("NYMEX's") physically-delivered Henry Hub natural gas futures contract for the same calendar month. The Platts bidweek price, which is published monthly, is based on a survey of cash market traders who voluntarily report to Platts data on their fixed-price transactions conducted during the last five business days of the month for physical delivery of natural gas at the Permian Basin; such bidweek transactions specify the delivery of natural gas on a uniform basis throughout the following calendar month at the agreed upon rate. The Platts bidweek index is published on the first business day of the month in which the gas flows. The size of the PER contract is 2,500 million British thermal units ("mmBtu"), and the unit of trading is any multiple of 2,500 mmBtu. The PER contract is listed for up to 72 consecutive calendar months.

The Henry Hub,[12] which is located in Erath, Louisiana, is the primary cash market trading and distribution center for natural gas in the United States. It also is the delivery point and pricing basis for the NYMEX's actively traded, physically-delivered natural gas futures contract, which is the most important pricing reference for natural gas in the United States. The Henry Hub, which is operated by Sabine Pipe Line, LLC, serves as a juncture for 13 different pipelines. These pipelines bring in natural gas from fields in the Gulf Coast region and ship it to major consumption centers along the East Coast and Midwest. The throughput shipping capacity of the Henry Hub is 1.8 trillion mmBtu per day.

In addition to the Henry Hub, there are a number of other locations where natural gas is traded. In 2008, there were 33 natural gas market centers in North America.[13] Some of the major trading centers include Alberta, Northwest Rockies, Southern California border and the Houston Ship Channel. For locations that are directly connected to the Henry Hub by one or more pipelines and where there typically is adequate shipping capacity, the price at the other locations usually directly tracks the price at the Henry Hub, adjusted for transportation costs. However, at other locations that are not directly connected to the Henry Hub or where shipping capacity is limited, the prices at those locations often diverge from the Henry Hub price. Furthermore, one local price may be significantly different than the price at another location even though the two markets' respective distances from the Henry Hub are the same. The reason for such pricing disparities is that a given location may experience supply and demand factors that are specific to that region, such as differences in pipeline shipping capacity, unusually high or low demand for heating or cooling or supply disruptions caused by severe weather. As a consequence, local natural gas prices can differ from the Henry Hub price by more than the cost of shipping and such price differences can vary in an unpredictable manner.

The Permian Basin is located in western Texas and serves as the major source of natural gas for the Waha (EPGT) and Waha (DCP/Atmos) natural gas market centers. The supply of natural gas in the El Paso Natural Gas Company's Permian Basin market comes from three sources: South of the Waha plant, the region south of the Keystone station to Waha, and the region south of the Plains station to Keystone.

The El Paso Natural Gas Company operates the largest capacity natural gas pipeline within the southwest region of the United States. It has the capability to transport up to 6.2 billion cubic feet per day of gas originating from the Permian Basin and the San Juan Basin (located in southern Colorado). The El Paso Natural Gas Company's southern system is the principal deliverer of natural gas to the southern leg of the Southern California Gas Company's pipeline system at Blythe, California, which in turn provides a route for

[10] In its October 9, 2009, **Federal Register** release, the Commission identified material price reference, price linkage and material liquidity as the possible criteria for SPDC determination of the PER contract. Arbitrage was not identified as a possible criterion. As a result, arbitrage will not be discussed further in this document and the associated Order.

[11] 17 CFR part 36, Appendix A.

[12] The term "hub" refers to a juncture where two or more natural gas pipelines are connected. Hubs also serve as pricing points for natural gas at the particular locations.

[13] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

natural gas deliveries to the San Diego Gas & Electric Company system and exports to Mexico at several locations along the U.S.-Mexico border.[14]

The Waha (EPGT) and Waha (CDP/Atmos) Texas Hubs, two market centers near the Permian Basin, had an estimated throughput capacity in 2008 of 250 million cubic feet per day and 300 million cubic feet per day, respectively. Moreover, the number of pipeline interconnections at each market center was 10 in 2008. Lastly, the pipeline interconnection capacities of the Waha (EPGT) and Waha (CDP/Atmos) Texas Hubs in 2008 were 1.8 billion million cubic feet per day and 2.3 billion cubic feet per day, respectively.[15] The Permian Basin is far removed from the Henry Hub and is not directly connected to the Henry Hub by an existing pipeline.

The local price at the Permian Basin typically differs from the price at the Henry Hub. Thus, the price of the Henry Hub physically-delivered futures contract is an imperfect proxy for the PER price. Moreover, exogenous factors, such as adverse weather, can cause the PER gas price to differ from the Henry Hub price by an amount that is more or less than the cost of shipping, making the NYMEX Henry Hub futures contract even less precise as a hedging tool than desired by market participants. Basis contracts[16] allow traders to more accurately discover prices at alternative locations and hedge price risk that is associated with natural gas at such locations. In this regard, a position at a local price for an alternative location can be established by adding the appropriate basis swap position to a position taken in the NYMEX physically-delivered Henry Hub contract (or in the NYMEX or ICE Henry Hub look-alike contract, which cash settle based on the NYMEX physically-delivered natural gas contract's final settlement price).

In its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage, and material liquidity as the potential SPDC criteria applicable to the PER contract. Each of these criteria is discussed below.[17]

1. Material Price Reference Criterion

The Commission's October 9, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "West Gas End of Day" and "OTC Gas End of Day"[18] packages with access to all price data or just current prices plus a selected number of months (i.e., 12, 24, 36 or 48 months) of historical data. These two packages include price data for the PER contract.

The Commission also noted that its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study")[19] found that in general, market participants view the ICE as a price discovery market for certain natural gas contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the PER contract, while not mentioned by name in the ECM Study, might warrant further study.

The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.[20] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

Following the issuance of the **Federal Register** release, the Commission further evaluated the ICE's data offerings and their use by industry participants. The El Paso Natural Gas Company's Permian Basin hub is a major trading center but is not as important as other hubs, such as the Waha hub, for pricing natural gas.

Although the Permian Basin is a major trading center for natural gas in the United States and, as noted, ICE sells price information for the PER contract, the Commission has found upon further evaluation that the cash market transactions are not being directly based or quoted as a differential to the PER contract nor is that contract routinely consulted by industry participants in pricing cash market transactions and thus does not meet the Commission's Guidance for the material price reference criterion. Thus, the PER contract does not satisfy the direct price reference test for existence of material price reference. Furthermore, the Commission notes that publication of the PER contract's prices is not indirect evidence material price reference. The PER contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the Permian Basin, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the PER contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the PER contract met the material price reference criterion for a SPDC.[21] The commenters argued that because the PER contract is cash-settled, it cannot truly serve as an independent "reference price" for transactions in natural gas at this location. Rather, the commenters argue, the underlying cash

[14] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/analysis_publications/ngpipeline/western.html.*

[15] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[16] Basis contracts denote the difference in the price of natural gas at a specified location minus the price of natural gas at the Henry Hub. The differential can be either a positive or negative value.

[17] As noted above, the Commission did not find an indication of arbitrage in connection with this contract; accordingly, that criterion was not discussed in reference to the PER contract.

[18] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

[19] *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/pr5403-07_ecmreport.pdf.*

[20] 17 CFR part 36, Appendix A.

[21] As noted above, IECA expressed the opinion that the PER contract met the criteria for SPDC determination but did not provide its reasoning.

price series against which the ICE PER contract is settled (in this case, the Platts bidweek price for natural gas at this location) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too limiting in that it only considers the final index value on which the contract is cash settled after trading ceases. Instead, the Commission believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements.

ICE [22] also argued that the Commission appeared to base the case that the PER contract is potentially a SPDC on a disputable assertion. In issuing its notice of intent to determine whether the PER contract is a SPDC, the CFTC cited a general conclusion in its ECM Study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts." ICE states that CFTC's reason is "hard to quantify as the ECM report does not mention" this contract as a potential SPDC. "It is unknown which market participants made this statement in 2007 or the contracts that were referenced." In response to the above comment, the Commission notes that it cited the ECM study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets merely as an indicia that an investigation of certain ICE contracts may be warranted, and was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

Both EI [23] and WGCEF [24] stated that publication of price data in a package format is a weak justification for material price reference. These commenters argue that market participants generally do not purchase ICE data sets for one contract's prices, such as those for the PER contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the PER prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the PER prices have substantial value to them. As mentioned above, the Commission notes that publication of the PER contract's prices is not indirect evidence of routine dissemination. The PER contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the Permian Basin, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the PER contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the PER contract does not meet the material price reference criterion because cash market transactions are not priced on a frequent and recurring basis at a differential to the PER contract's price (direct evidence). Moreover, while the ECM sells the PER contract's price data to market participants, market participants likely do not specifically purchase the ICE data packages for the PER contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

2. Price Linkage Criterion

In its October 9, 2009, **Federal Register** notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the PER contract. In this regard, the final settlement of the PER contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas futures contract, where the NYMEX is registered with the Commission as a DCM.

The Commission's Guidance on Significant Price Discovery Contracts [25] notes that a "price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract." Furthermore, the Guidance notes that, "[f]or a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract. The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract." Furthermore, the Guidance proposes a threshold price relationship such that prices of the ECM linked contract will fall within a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement or other daily prices over the most recent quarter. Finally, in the Guidance the Commission stated that it would consider a linked contract that has a trading volume equivalent to 5 percent of the volume of trading in the contract to which it is linked to have sufficient volume to be deemed a SPDC ("minimum threshold").

To assess whether the PER contract meets the price linkage criterion, Commission staff obtained price data from ICE and performed the statistical tests cited above. Staff found that, while the PER contract price is determined, in part, by the final settlement price of the NYMEX physically-delivered natural gas futures contract (a DCM contract), the imputed PER location price (derived by adding the NYMEX Henry Hub Natural Gas price to the ICE PER basis price) is not within 2.5 percent of the settlement price of the corresponding NYMEX Henry Hub natural gas futures contract on 95 percent or more of the days. Specifically, during the third quarter of 2009, less than one percent of the Permian Basin natural gas prices derived from the ICE basis values were within 2.5 percent of the daily settlement price of the NYMEX Henry Hub futures contract. In addition, staff found that the PER contract fails to meet the volume threshold requirement. In particular, the total trading volume in the NYMEX Natural Gas contract during the third quarter of 2009 was 14,022,963 contracts, with 5 percent of that number being 701,148 contracts. Trades on the ICE centralized market in the PER contract during the same period was 48,450 contracts (equivalent to 12,112 NYMEX contracts, given the size difference).[26] Thus, centralized-market trades in the PER contract amounted to less than the minimum threshold.[27]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question

[22] CL 04.

[23] CL 05.

[24] CL 02.

[25] Appendix A to the Part 36 rules.

[26] The size of the NYMEX Henry Hub physically-delivered natural gas futures contract is 10,000 mmBtu. The PER contract has a trading unit of 2,500 mmBtu, which is one-quarter the size of the NYMEX Henry Hub contract.

[27] Supplemental data subsequently submitted by the ICE indicated that block trades are included in the on-exchange trades; block trades comprise 56 percent of all transactions in the PER contract.

of whether the PER contract met the price linkage criterion for a SPDC.[28] Each of the commenters expressed the opinion that the PER contract did not appear to meet the above-discussed Commission guidance regarding the price relationship and/or the minimum volume threshold relative to the DCM contract to which the PER contract is linked. Based on its analysis discussed above, the Commission agrees with this assessment.

ii. Conclusion Regarding the Price Linkage Criterion

Based on the above, the Commission finds that the PER contract does not meet the price linkage criterion because it fails the price relationship and volume tests provided for in the Commission's Guidance.

3. Material Liquidity Criterion

As noted above, in its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as potential criteria for SPDC determination of the PER contract. To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that the prices of the subject contract potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE's electronic platform in the PER contract was 727 in the second quarter of 2009, resulting in a daily average of 11.4 trades. During the same period, the PER contract had a total trading volume of 49,200 contracts and an average daily trading volume of 768.8 contracts. Moreover, open interest as of June 30, 2009, was 55,940 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.[29]

In a subsequent filing dated November 13, 2009, ICE reported that total trading volume in the third quarter of 2009 was 48,450 contracts (or 734 contracts on a daily basis). In term of number of transactions, 776 trades occurred in the third quarter of 2009 (11.8 trades per day). As of September 30, 2009, open interest in the PER contract was 53,981 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

As indicated above, the average number of trades per day in the second and third quarters of 2009 was only slightly above the minimum reporting level (5 trades per day). Moreover, trading activity in the PER contract, as characterized by total quarterly volume, indicates that the PER contract experiences trading activity similar to that of other thinly-traded contracts.[30] Thus, the PER contract does not meet a threshold of trading activity that would render it of potential importance and no additional statistical analysis is warranted.[31]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the PER contract met the material liquidity criterion for a SPDC.[32] These commenters stated that the PER contract does not meet the material liquidity criterion for SPDC determination for a number of reasons.

WGCEF, ICE and EI noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day, and noted that the relatively low number of trades per day in the PER contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another."

WGCEF, FIEG and NGSA noted that the PER contract represents a differential, which does not affect other contracts, including the NYMEX Henry Hub contract and physical gas contracts. FIEG and WGCEF also noted that the PER contract's trading volume represents only a fraction of natural gas trading.

ICE opined that the Commission "seems to have adopted a five-trades-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five-trades-per-day threshold as the basis for an ECM to *report* trade data to the CFTC." Furthermore, FIEG cautioned the Commission in using a reporting threshold as a measure of liquidity. In this regard, the Commission adopted a five-trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"[33] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC but this does not mean that the contract will be found to be a SPDC merely because it met the reporting threshold.

ICE and EI proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all months of each contract" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a single traded month or strip of a given contract."[34] A similar

[28] As noted above, IECA expressed the opinion that the PER contract met the criteria for SPDC determination but did not provide its reasoning.

[29] 74 FR 52194 (October 9, 2009).

[30] Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

[31] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], * * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." For the reasons discussed above, the Commission has found that the PER contract does not meet either the price linkage or material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since it cannot be used alone as a basis for a SPDC determination.

[32] As noted above, IECA expressed the opinion that the PER contract met the criteria for SPDC determination but did not provide its reasoning.

[33] 73 FR 75892 (December 12, 2008)

[34] In addition, both EI and ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 9, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental

argument was made by EI, which observed that the five-trades-per-day number "is highly misleading * * * because the contracts can be offered for as long as 120 months, [thus] the average per day for an individual contract may be less than 1 per day."

It is the Commission's opinion that liquidity, as it pertains to the PER contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE PER contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the PER contract does not meet the material price reference or price linkage criteria, according to the Commission's Guidance, it would be unnecessary to evaluate whether the PER contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission has found that the PER contract does not meet the material liquidity criterion for a SPDC determination.

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the PER contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA. Specifically, the Commission has determined that the PER contract does not meet the material price reference, price linkage and material liquidity criteria at this time. Accordingly, the Commission will issue the attached Order declaring that the PER contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its PER contract.[35] Accordingly, with respect to its PER contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply with the applicable reporting requirements.

IV. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA") [36] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA [37] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act. The Commission has considered the costs and benefits in light of the specific provisions of section 15(a) of the Act and has concluded that the Order, required by Congress to strengthen federal oversight of exempt commercial markets and to prevent market manipulation, is necessary and appropriate to accomplish the purposes of section 2(h)(7) of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order fining that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Amendments to section 4(i) of the CEA authorize the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

The Commission has concluded that ICE's PER contract, which is the subject of the attached Order, is not a SPDC; accordingly, the Commission's Order imposes no additional costs and no additional statutorily or regulatory mandated responsibilities on the ECM.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [38] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect exempt commercial markets. The Commission previously has determined that exempt commercial markets are not small entities for purposes of the RFA.[39] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Order, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

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data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 56 percent of all transactions in the PER contract. The Commission acknowledges that the open interest information it provided in its October 9, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

[35] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[36] 44 U.S.C. 3507(d).

[37] 7 U.S.C. 19(a).

[38] 5 U.S.C. 601 *et seq.*

[39] 66 FR 42256, 42268 (Aug. 10, 2001).

V. Order

a. Order Relating to the Permian Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Permian Financial Basis contract, traded on the IntercontinentalExchange, Inc., does not at this time perform a significant price discovery function. In this regard, the Permian Financial Basis contract does not satisfy the material price reference, price linkage and material liquidity criteria for significant price discovery contracts. Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity [40] with respect to the Permian Financial Basis contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the Permian Financial Basis contract with the issuance of this Order.

This Order is based on the representations made to the Commission by the IntercontinentalExchange, Inc., dated July 27, 2009, and November 13, 2009, and other supporting material. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its current determination that the Permian Financial Basis contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

Issued in Washington, DC, on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–10339 Filed 5–4–10; 8:45 am]

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[40] 7 U.S.C. 1a(29).

COMMODITY FUTURES TRADING COMMISSION

Order Finding That the TETCO–M3 Financial Basis Contract Traded on the IntercontinentalExchange, Inc., Does Not Perform a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: On October 9, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the TETCO–M3 Financial Basis ("TMT") contract traded on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue an order finding that the TMT contract does not perform a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective date:* April 28, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. *Telephone:* (202) 418–5515. *E-mail: gprice@cftc.gov;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. *Telephone:* (202) 418–5133. *E-mail: snathan@cftc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [2] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[3] The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its

[1] 74 FR 52186 (October 9, 2009).

[2] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

[3] 7 U.S.C. 1a(29).

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[5] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[6]

II. Notice of Intent To Undertake SPDC Determination

On October 9, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the TMT contract performs a significant price discovery function and requested comment from interested parties.[7] Comments were received from Industrial Energy Consumers of America ("IECA"), Working Group of Commercial Energy Firms ("WGCEF"), Platts, ICE, Economists Incorporated ("EI"), Natural Gas Supply Association ("NGSA"), Federal Energy Regulatory Commission ("FERC") and Financial Institutions Energy Group ("FIEG").[8] The comment letters from FERC[9] and Platts did not directly address the issue of whether or not the TMT contract is a SPDC; IECA expressed the opinion that the TMT contract did perform a significant price discovery function; and thus, should be subject to the requirements of the core principles enumerated in Section 2(h)(7) of the Act, but did not elaborate on its reasons for saying so or directly address any of the criteria. The remaining comment letters raised substantive issues with respect to the applicability of section 2(h)(7) to the TMT contract and generally expressed the opinion that the TMT contract is not a SPDC because it does not meet the price linkage, material price reference and material liquidity criteria for SPDC determination. These comments are more extensively discussed below, as applicable.

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.
- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.
- *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[10] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[11] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become

[5] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). *See* also 73 FR 75888, 75894 (Dec. 12, 2008).

[6] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[7] The Commission's Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

[8] IECA describes itself as an "association of leading manufacturing companies" whose membership "represents a diverse set of industries including: Plastics, cement, paper, food processing, brick, chemicals, fertilizer, insulation, steel, glass, industrial gases, pharmaceutical, aluminum and brewing." WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." McGraw-Hill, through its division Platts, compiles and calculates monthly natural gas price indices from natural gas trade data submitted to Platts by energy marketers. Platts includes those price indices in its monthly *Inside FERC's Gas Market Report* ("Inside FERC"). ICE is an exempt commercial market, as noted above. EI is an economic consulting firm with offices located in Washington, DC, and San Francisco, CA. NGSA is an industry association comprised of natural gas producers and marketers. FERC is an independent federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, "including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors." The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09-014.html.*

[9] FERC stated that the TMT contract is cash settled and does not contemplate the actual physical delivery of natural gas. Accordingly, FERC expressed the opinion that a determination by the Commission that a contract performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Natural Gas Act (NGA) over certain sales of natural gas in interstate commerce for resale or with its other regulatory responsibilities under the NGA" and further that, "FERC staff will continue to monitor for any such conflict * * * [and] advise the CFTC" should any such potential conflict arise. CL 07.

[10] In its October 9, 2009, **Federal Register** release, the Commission identified material price reference, price linkage and material liquidity as the possible criteria for SPDC determination of the TMT contract. Arbitrage was not identified as a possible criterion. As a result, arbitrage will not be discussed further in this document and the associated Order.

[11] 17 CFR part 36, Appendix A.

interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

IV. Findings and Conclusions

The TETCO–M3 Financial Basis (TMT) Contract and the SPDC Indicia

The TMT contract is cash settled based on the difference between the bidweek price index for a particular calendar month at the Texas Eastern Transmission Company's ("TETCO's") M3 zone, as published in Platts' *Inside FERC's Gas Market Report,* and the final settlement price of the New York Mercantile Exchange's ("NYMEX's") physically-delivered Henry Hub natural gas futures contract for the same calendar month. The Platts bidweek price, which is published monthly, is based on a survey of cash market traders who voluntarily report to Platts data on their fixed-price transactions conducted during the last five business days of the month for physical delivery of natural gas at the M3 zone; such bidweek transactions specify the delivery of natural gas on a uniform basis throughout the following calendar month at the agreed upon rate. The Platts bidweek index is published on the first business day of the calendar month in which the natural gas is to be delivered. The size of the TMT contract is 2,500 million British thermal units ("mmBtu"), and the unit of trading is any multiple of 2,500 mmBtu. The TMT contract is listed for up to 72 consecutive calendar months.

The Henry Hub,[12] which is located in Erath, Louisiana, is the primary cash market trading and distribution center for natural gas in the United States. It also is the delivery point and pricing basis for the NYMEX's actively traded, physically-delivered natural gas futures contract, which is the most important pricing reference for natural gas in the United States. The Henry Hub, which is operated by Sabine Pipe Line, LLC, serves as a juncture for 13 different pipelines. These pipelines bring in natural gas from fields in the Gulf Coast region and ship it to major consumption centers along the East Coast and Midwest. The throughput shipping capacity of the Henry Hub is 1.8 trillion mmBtu per day.

In addition to the Henry Hub, there are a number of other locations where natural gas is traded. In 2008, there were 33 natural gas market centers in North America.[13] Some of the major trading centers include Alberta, Northwest Rockies, Southern California border and the Houston Ship Channel. For locations that are directly connected to the Henry Hub by one or more pipelines and where there typically is adequate shipping capacity, the price at the other locations usually directly tracks the price at the Henry Hub, adjusted for transportation costs. However, at other locations that are not directly connected to the Henry Hub or where shipping capacity is limited, the prices at those locations often diverge from the Henry Hub price. Furthermore, one local price may be significantly different than the price at another location even though the two markets' respective distances from the Henry Hub are the same. The reason for such pricing disparities is that a given location may experience supply and demand factors that are specific to that region, such as differences in pipeline shipping capacity, unusually high or low demand for heating or cooling or supply disruptions caused by severe weather. As a consequence, local natural gas prices can differ from the Henry Hub price by more than the cost of shipping and such price differences can vary in an unpredictable manner.

TETCO transports natural gas from production areas in Texas, Louisiana, and the Gulf of Mexico to the Mid-Atlantic and Northeast regions of the United States. The TETCO system, owned and operated by Spectra Energy Transmission, spans some 9,200 miles and has a capacity of 6.7 billion cubic feet per day with 75 billion cubic feet of storage.[14] The TMT contract prices trading activity at the M3 zone of TETCO's pipeline. The M3 zone is defined as the portion of the pipeline traversing the area between eastern Pennsylvania near the New Jersey border and north central New Jersey. Specifically, the Platts index includes deliveries at any point between the Delmont compressor station in Westmoreland County, Pennsylvania, and the Hanover and Linden stations in Morris County, New Jersey. Included are deals delivered at interconnections with New York City distributors' citygates and with Algonquin Gas Transmission at Lambertville in Hunterdon County, New Jersey, and at the Hanover station.

The Dominion hub, a market center that encompasses the Leidy area of north central Pennsylvania includes the TETCO M3 natural gas trading hub. The Dominion market center had an estimated throughput capacity of 2.5 billion cubic feet per day in 2008. Moreover, the number of pipeline interconnections at the Dominion hub was 17 in 2008, up from 16 in 2003. Lastly, the pipeline interconnection capacity of the Dominion hub in 2008 was 8.3 billion cubic feet per day, which constituted a 42 percent increase over the pipeline interconnection capacity in 2003.[15] The TMT hub is far removed from the Henry Hub but is directly connected to the Henry Hub by TETCO's interstate pipeline system.

The local price at the TMT location typically differs from the price at the Henry Hub. Thus, the price of the Henry Hub physically-delivered futures contract is an imperfect proxy for the TMT price. Moreover, exogenous factors, such as adverse weather, can cause the TMT gas price to differ from the Henry Hub price by an amount that is more or less than the cost of shipping, making the NYMEX Henry Hub futures contract even less precise as a hedging tool than desired by market participants. Basis contracts[16] allow traders to more accurately discover prices at alternative locations and hedge price risk that is associated with natural gas at such locations. In this regard, a position at a local price for an alternative location can be established by adding the appropriate basis swap position to a position taken in the NYMEX physically-delivered Henry Hub contract (or in the NYMEX or ICE Henry Hub look-alike contract, which cash settle based on the NYMEX physically-delivered natural gas contract's final settlement price).

In its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as the potential SPDC criteria applicable to the TMT contract. Each of these criteria is discussed below.[17]

[12] The term "hub" refers to a juncture where two or more natural gas pipelines are connected. Hubs also serve as pricing points for natural gas at the particular locations.

[13] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[14] *See http://www.spectraenergy.com/what_we_do/businesses/us/assets/texas_eastern/.*

[15] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[16] Basis contracts denote the difference in the price of natural gas at a specified location minus the price of natural gas at the Henry Hub. The differential can be either a positive or negative value.

[17] As noted above, the Commission did not find an indication of arbitrage in connection with this

1. Material Price Reference Criterion

The Commission's October 9, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "East Gas End of Day" and "OTC Gas End of Day" [18] packages with access to all price data or just current prices plus a selected number of months (*i.e.,* 12, 24, 36 or 48 months) of historical data. These two packages include price data for the TMT contract.

The Commission also noted that its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study") [19] found that in general, market participants view the ICE as a price discovery market for certain natural gas contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the TMT contract, while not mentioned by name in the ECM Study, might warrant further study. Following the issuance of the **Federal Register** release, the Commission further evaluated ICE's data offerings and their use by industry participants. The TETCO M3 zone is a significant trading center for natural gas but is not as important as other hubs, such as the Henry Hub, for pricing natural gas in the eastern half of the U.S. marketplace.

The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.[20] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

The M3 zone is a major trading center for natural gas in the United States and, as noted, ICE sells price information for the TMT contract. Upon further evaluation, however, the Commission has found that the cash market transactions are not being directly based on or quoted as a differential to the TMT contract nor is that contract routinely consulted by industry participants in pricing cash market transactions. Thus, the contract does not meet the Commission's Guidance for the material price reference criterion. In this regard, liquidity constraints caused by severe winter weather on peak days may create complications for cash market participants. Because the TMT contract is not consulted on a frequent basis, it does not satisfy the direct price reference test for the existence of material price reference. Furthermore, the Commission notes that publication of the TMT contract's prices is not indirect evidence of material price reference. The TMT contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the M3 zone, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the TMT contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the TMT contract met the material price reference criterion for a SPDC.[21] The commenters argued that because the TMT contract is cash-settled, it cannot truly serve as an independent "reference price" for transactions in natural gas at this location. Rather, the commenters argue, the underlying cash price series against which the ICE TMT contract is settled (in this case, the Platts bidweek price for natural gas at this location) is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too limiting and believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements. As noted above, the M3 zone is a significant trading center for natural gas in North America. However, traders do not consider the M3 zone to be as important as other natural gas trading points.

ICE also argued that the Commission appeared to base the case that the TMT contract is potentially a SPDC on a disputable assertion. In issuing its notice of intent to determine whether the TMT contract is a SPDC, the CFTC cited a general conclusion in its ECM Study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts." ICE states that CFTC's reason is "hard to quantify as the ECM report does not mention" this contract as a potential SPDC. "It is unknown which market participants made this statement *in 2007* or the contracts that were referenced." In response to the above comment, the Commission notes that it cited the ECM Study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets merely as an indicia that an investigation of certain ICE contracts may be warranted. The ECM Study was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

Both EI [22] and WGCEF [23] stated that publication of price data in a package format is a weak justification for material price reference. These commenters argue that market participants generally do not purchase

contract; accordingly, that criterion was not discussed in reference to the TMT contract.

[18] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

[19] *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/pr5403-07_ecmreport.pdf.*

[20] 17 CFR part 36, Appendix A.

[21] As noted above, IECA expressed the opinion that the TMT contract met the criteria for SPDC determination but did not provide its reasoning.

[22] CL 05.

[23] CL 02.

ICE data sets for one contract's prices, such as those for the TMT contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the TMT prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the TMT prices have substantial value to them. As mentioned above, the Commission notes that publication of the TMT contract's prices is not indirect evidence of routine dissemination. The TMT contract's prices are published with those of numerous other contracts, which are of more interest to market participants. Due to the lack of importance of the M3 zone, the Commission has concluded that traders likely do not specifically purchase the ICE data packages for the TMT contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions.

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the TMT contract does not meet the material price reference criterion because cash market transactions are not priced either explicitly or implicitly on a frequent and recurring basis at a differential to the TMT contract's price (direct evidence). Moreover, while the ECM sells the TMT contract's price data to market participants, market participants likely do not specifically purchase the ICE data packages for the TMT contract's prices and do not consult such prices on a frequent and recurring basis in pricing cash market transactions (indirect evidence).

2. Price Linkage Criterion

In its October 9, 2009, **Federal Register** notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the TMT contract. In this regard, the final settlement of the TMT contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas futures contract, where the NYMEX is registered with the Commission as a DCM.

The Commission's Guidance on Significant Price Discovery Contracts notes that a "price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract." [24] Furthermore, the Guidance notes that, "[f]or a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract. The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract." [25] Furthermore, the Guidance proposes a threshold price relationship such that prices of the ECM linked contract will fall within a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement or other daily prices over the most recent quarter. Finally, in Guidance the Commission stated that it would consider a linked contract that has a trading volume equivalent to 5 percent of the volume of trading in the contract to which it is linked to have sufficient volume to be deemed a SPDC ("minimum threshold"). [26]

To assess whether the TMT contract meets the price linkage criterion, Commission staff obtained price data from ICE and performed the statistical tests cited above. Staff found that, while the TMT contract price is determined, in part, by the final settlement price of the NYMEX physically-delivered natural gas futures contract (a DCM contract), the imputed TMT location price (derived by adding the NYMEX Henry Hub Natural Gas price to the ICE TCO basis price) is not within 2.5 percent of the settlement price of the corresponding NYMEX Henry Hub natural gas futures contract on 95 percent or more of the days. Specifically, during the third quarter of 2009, none of the TMT natural gas prices derived from the ICE basis values were within 2.5 percent of the daily settlement price of the NYMEX Henry Hub futures contract. In addition, staff found that the TMT contract fails to meet the volume threshold requirement. In particular, the total trading volume in the NYMEX Natural Gas contract during the third quarter of 2009 was 14,022,963 contracts, with 5 percent of that number being 701,148 contracts. Trades on the ICE centralized market in the TMT contract during the same period was 145,681 contracts (equivalent to 36,420 NYMEX contracts, given the size difference). [27] Thus, centralized-market trades in the TMT contract amounted to less than the minimum threshold. [28]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the TMT contract met the price linkage criterion for a SPDC. [29] Each of the commenters expressed the opinion that the TMT contract did not appear to meet the above-discussed Commission guidance regarding the price relationship and/or the minimum volume threshold relative to the DCM contract to which the TMT is linked. Based on its analysis discussed above, the Commission agrees with this assessment.

ii. Conclusion Regarding the Price Linkage Criterion

Based on the above, the Commission finds that the TMT contract does not meet the price linkage criterion because it fails the price relationship and volume tests provided for in the Commission's Guidance.

3. Material Liquidity Criterion

As noted above, in its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as potential criteria for SPDC determination of the TMT contract. To assess whether a contract meets the material liquidity criterion, the Commission first examines trading activity as a general measurement of the contract's size and potential importance. If the Commission finds that the contract in question meets a threshold of trading activity that would render it of potential importance, the Commission will then perform a statistical analysis to measure the effect that the prices of the subject contract potentially may have on prices for other contracts listed on an ECM or a DCM.

The total number of transactions executed on ICE's electronic platform in the TMT contract was 1,073 in the second quarter of 2009, resulting in a daily average of 16.8 trades. During the same period, the TMT contract had a total trading volume of 145,328 contracts and an average daily trading

[24] Appendix A to the Part 36 rules.

[25] *Id.*

[26] *Id.*

[27] The size of the NYMEX Henry Hub physically-delivered natural gas futures contract is 10,000 mmBtu. The TMT contract has a trading unit of 2,500 mmBtu, which is one-quarter the size of the NYMEX Henry Hub contract.

[28] Supplemental data subsequently submitted by the ICE indicated that block trades are included in the on-exchange trades; block trades comprise 63.3 percent of all transactions in the TMT contract.

[29] As noted above, IECA expressed the opinion that the TMT contract met the criteria for SPDC determination but did not provide its reasoning.

volume of 2,271 contracts. Moreover, open interest as of June 30, 2009, was 168,963 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing. In this regard, ICE does not differentiate between open interest created by a transaction executed on its trading platform and that created by a transaction executed off its trading platform.[30]

In a subsequent filing dated November 13, 2009, ICE reported that total trading volume in the third quarter of 2009 was 145,681 contracts (or 2,207 contracts on a daily basis). In terms of number of transactions, 1,140 trades occurred in the third quarter of 2009 (17.3 trades per day). As of September 30, 2009, open interest in the TMT contract was 251,573 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.

As indicated above, the average number of trades per day in the second and third quarters of 2009 was above the minimum reporting level (5 trades per day). Moreover, trading activity in the TMT contract, as characterized by total quarterly volume, indicates that the TMT contract experiences trading activity that is greater than in thinly-traded contracts.[31] This level of trading activity would ordinarily merit a statistical analysis to measure the effect that the prices of the subject contract potentially may have on prices for other contracts listed on an ECM or DCM. However, in light of the fact that the Commission has found that the TETCO–M3 contract does not meet the material price reference or price linkage criteria, according to the Commission's guidance it would be unnecessary to evaluate whether the TETCO–M3 contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.[32]

i. **Federal Register** Comments

As noted above, WGCEF, ICE, EI, NGSA and FIEG addressed the question of whether the TMT contract met the material liquidity criterion for a SPDC.[33] These commenters stated that the TMT contract does not meet the material liquidity criterion for SPDC determination for a number of reasons.

WGCEF,[34] ICE[35] and EI[36] noted that the Commission's Guidance had posited concepts of liquidity that generally assumed a fairly constant stream of prices throughout the trading day, and noted that the relatively low number of trades per day in the TMT contract did not meet this standard of liquidity. The Commission observes that a continuous stream of prices would indeed be an indication of liquidity for certain markets but the Guidance also notes that "quantifying the levels of immediacy and price concession that would define material liquidity may differ from one market or commodity to another."[37]

WGCEF, FIEG[38] and NGSA[39] noted that the TMT contract represents a differential, which does not affect other contracts, including the NYMEX Henry Hub contract and physical gas contracts. FIEG and WGCEF also noted that the TMT contract's trading volume represents only a fraction of natural gas trading.

ICE opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to *report* trade data to the CFTC." Furthermore, FIEG cautioned the Commission in using a reporting threshold as a measure of liquidity. In this regard, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"[40] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC but this does not mean that the contract will be found to be a SPDC merely because it met the reporting threshold.

ICE and EI proposed that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in *all months of each contract*" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a *single* traded month or strip of a given contract."[41] A similar argument was made by EI, which observed that the five-trades-per-day number "is highly misleading * * * because the contracts can be offered for as long as 120 months, [thus] the average per day for an individual contract may be less than 1 per day."

It is the Commission's opinion that liquidity, as it pertains to the TMT contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the ICE TMT contract itself would be considered liquid. In any event, in light of the fact that the Commission has found that the TMT contract does not meet the material price reference or price linkage criteria, according to the Commission's Guidance, it would be unnecessary to evaluate whether the TM contract meets the material liquidity criterion since it cannot be used alone for SPDC determination.

[30] 74 FR 52186 (October 9, 2009).

[31] Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

[32] In establishing guidance to illustrate how it will evaluate the various criteria, or combinations of criteria, when determining whether a contract is a SPDC, the Commission made clear that "material liquidity itself would not be sufficient to make a determination that a contract is a [SPDC], * * * but combined with other factors it can serve as a guidepost indicating which contracts are functioning as [SPDCs]." For the reasons discussed above, the Commission has found that the TMT contract does not meet either the price linkage or material price reference criterion. In light of this finding and the Commission's Guidance cited above, there is no need to evaluate further the material liquidity criteria since it cannot be used alone as a basis for a SPDC determination.

[33] As noted above, IECA expressed the opinion that the TMT contract met the criteria for SPDC determination but did not provide its reasoning.

[34] CL 02.

[35] CL 04.

[36] CL 05.

[37] Guidance, *supra.*

[38] CL 08.

[39] CL 06.

[40] 73 FR 75892 (December 12, 2008).

[41] In addition, both EI and ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which were cited in the Commission's October 9, 2009, **Federal Register** notice includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings; ICE confirmed that the volume data it provided and which the Commission cited includes only transaction data executed on ICE's electronic trading platform. As noted above, supplemental data supplied by ICE confirmed that block trades are in addition to the trades that were conducted on the electronic platform; block trades comprise about 63 percent of all transactions in the TMT contract. Commission acknowledges that the open interest information it provided in its October 9, 2009, **Federal Register** notice includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created. CL 04.

ii. Conclusion Regarding Material Liquidity

For the reasons discussed above, the Commission has found that the TMT contract does not meet either the price linkage or material price reference criteria. Accordingly, there is no need to evaluate further the material liquidity criterion since it cannot be used alone as a basis for a SPDC determination.

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the TMT contract does not perform a significant price discovery function under the criteria established in section 2(h)(7) of the CEA.

Specifically, the Commission has determined that the TMT contract does not meet the material price reference and price linkage criteria at this time. In light of the fact that the Commission has found that the TMT contract does not meet the material price reference or price linkage criteria, according to the Commission's Guidance, it would be unnecessary to evaluate whether the TMT contract meets the material liquidity criterion since it cannot be used alone for SPDC determination. Accordingly, the Commission is issuing the attached Order declaring that the TMT contract is not a SPDC.

Issuance of this Order indicates that the Commission does not at this time regard ICE as a registered entity in connection with its TMT contract.[42] Accordingly, with respect to its TMT contract, ICE is not required to comply with the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) for ECMs with SPDCs. However, ICE must continue to comply with the applicable reporting requirements for ECMs.

IV. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")[43] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA[44] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act. The Commission has considered the costs and benefits in light of the specific provisions of section 15(a) of the Act and has concluded that the Order, required by Congress to strengthen federal oversight of exempt commercial markets and to prevent market manipulation, is necessary and appropriate to accomplish the purposes of section 2(h)(7) of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order fining that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Amendments to section 4(i) of the CEA authorize the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

The Commission has concluded that ICE's TMT contract, which is the subject of the attached Order, is not a SPDC; accordingly, the Commission's Order imposes no additional costs and no additional statutorily or regulatory mandated responsibilities on the ECM.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")[45] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect exempt commercial markets. The Commission previously has determined that exempt commercial markets are not small entities for purposes of the RFA.[46] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Order, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

V. Order

Order Relating to the TETCO–M3 Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the TETCO–M3 Financial Basis contract, traded on the IntercontinentalExchange, Inc., does not at this time satisfy the material price reference and price linkage criteria for significant price discovery contracts. In light of the fact that the Commission has found that the TMT contract does not meet the material price reference or price linkage criteria, according to the Commission's Guidance, it would be unnecessary to evaluate whether the TMT contract meets the material

[42] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[43] 44 U.S.C. 3507(d).

[44] 7 U.S.C. 19(a).

[45] 5 U.S.C. 601 *et seq.*

[46] 66 FR 42256, 42268 (Aug. 10, 2001).

liquidity criterion since it cannot be used alone for SPDC determination.

Consistent with this determination, the IntercontinentalExchange, Inc., is not considered a registered entity [47] with respect to the TETCO–M3 Financial Basis contract and is not subject to the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., are not applicable to the TETCO–M3 Financial Basis contract with the issuance of this Order.

This Order is based on the representations made to the Commission by the IntercontinentalExchange, Inc., dated July 27, 2009, and November 13, 2009, and other supporting material. Any material change or omissions in the facts and circumstances pursuant to which this order is granted might require the Commission to reconsider its current determination that the TETCO–M3 Financial Basis contract is not a significant price discovery contract. Additionally, to the extent that it continues to rely upon the exemption in Section 2(h)(3) of the Act, the IntercontinentalExchange, Inc., must continue to comply with all of the applicable requirements of Section 2(h)(3) and Commission Regulation 36.3.

Issued in Washington, DC on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–10330 Filed 5–4–10; 8:45 am]

BILLING CODE P

COMMODITY FUTURES TRADING COMMISSION

Order Finding That the ICE Chicago Financial Basis Contract Traded on the IntercontinentalExchange, Inc., Performs a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final Order.

SUMMARY: On October 9, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the Chicago Financial Basis ("DGD") contract, traded on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue an order finding that the DGD contract performs a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective date:* April 28, 2010.

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SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [2] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[3] The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily prices of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[5] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[6]

[47] 7 U.S.C. 1a(29).

[1] 74 FR 52198 (October 9, 2009).

[2] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

[3] 7 U.S.C. 1a(29).

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[5] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). *See also* 73 FR 75888, 75894 (Dec. 12, 2008).

[6] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC

Continued

II. Notice of Intent To Undertake SPDC Determination

On October 9, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the DGD contract performs a significant price discovery function, and requested comment from interested parties.[7] Comments were received from the Industrial Energy Consumers of America ("IECA"), Working Group of Commercial Energy Firms ("WGCEF"), ICE, Economists Incorporated ("EI"), Natural Gas Supply Association ("NGSA"), Federal Energy Regulatory Commission ("FERC"), and Financial Institutions Energy Group ("FIEG").[8] The comment letter from FERC[9] did not directly address the issue of whether or not the DGD contract is a SPDC; IECA concluded that the DGD contract is a SPDC, but did not provide a basis for its conclusion.[10] The other parties' comments raised substantive issues with respect to the applicability of section 2(h)(7) to the DGD contract, generally asserting that the DGD contract is not a SPDC as it does not meet the material liquidity, material price reference and price linkage criteria for SPDC determination. Those comments are more extensively discussed below, as applicable.

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.
- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.
- *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[11] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[12] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

IV. Findings and Conclusions

a. The Chicago (DGD) Financial Basis Contract and the SPDC Indicia

The DGD contract is cash settled based on the difference between the bidweek price index for the price of natural gas at the Chicago hub for the month of delivery, as published in

determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[7] The Commission's Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

[8] IECA describes itself as an "association of leading manufacturing companies" whose membership "represents a diverse set of industries including: plastics, cement, paper, food processing, brick, chemicals, fertilizer, insulation, steel, glass, industrial gases, pharmaceutical, aluminum and brewing." WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." ICE is an ECM, as noted above. EI is an economic consulting firm with offices located in Washington, DC, and San Francisco, CA. NGSA is an industry association comprised of natural gas producers and marketers. FERC is an independent federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, "including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors." The comment letters are available on the Commission's website: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09–017.html.*

[9] FERC stated that the DGD contract is cash settled and does not contemplate actual physical delivery of natural gas. Accordingly, FERC expressed the opinion that a determination by the Commission that a contract performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Natural Gas Act (NGA) over certain sales of natural gas in interstate commerce for resale or with its other regulatory responsibilities under the NGA" and further that, "the FERC staff will continue to monitor for any such conflict * * * [and] advise the CFTC" should any such potential conflict arise. CL 06.

[10] IECA stated that the subject ICE contract should "be required to come into compliance with core principles mandated by Section 2(h)(7) of the Act and with other statutory provisions applicable to registered entities. [This contract] should be subject to the Commission's position limit authority, emergency authority and large trader reporting requirements, among others." CL 01.

[11] In its October 9, 2009, **Federal Register** release, the Commission identified material price reference, price linkage and material liquidity as the possible criteria for SPDC determination of the DGD contract. Arbitrage was not identified as a possible criterion and will not be discussed further in this document or the associated Order.

[12] 17 CFR part 36, Appendix A.

Intelligence Press Inc.'s ("IPI's") *Natural Gas Bidweek Survey,* and the final settlement price of the New York Mercantile Exchange's ("NYMEX's") physically-delivered Henry Hub natural gas futures contract for the same calendar month. The IPI bidweek price, which is published monthly, is based on a survey of cash market traders who voluntarily report to IPI data on fixed-price transactions for physical delivery of natural gas at the Chicago hub conducted during the last five business days of the month; such bidweek transactions specify the delivery of natural gas on a uniform basis throughout the following calendar month at the agreed-upon rate. The IPI bidweek index is published on the first business day of the calendar month in which the natural gas is to be delivered. The size of the DGD contract is 2,500 million British thermal units ("mmBtu"), and the unit of trading is any multiple of 2,500 mmBtu. The DGD contract is listed for up to 72 calendar months commencing with the next calendar month.

The Henry Hub,[13] which is located in Erath, Louisiana, is the primary cash market trading and distribution center for natural gas in the United States. It also is the delivery point and pricing basis for the NYMEX's actively traded, physically-delivered natural gas futures contract, which is the most important pricing reference for natural gas in the United States. The Henry Hub, which is operated by Sabine Pipe Line, LLC, serves as a juncture for 13 different pipelines. These pipelines bring in natural gas from fields in the Gulf Coast region and ship it to major consumption centers along the East Coast and Midwest. The throughput shipping capacity of the Henry Hub is 1.8 trillion mmBtu per day.

In addition to the Henry Hub, there are a number of other locations where natural gas is traded. In 2008, there were 33 natural gas market centers in North America.[14] Some of the major trading centers include Alberta, Northwest Rockies, Southern California border and the Houston Ship Channel. For locations that are directly connected to the Henry Hub by one or more pipelines and where there typically is adequate shipping capacity, the price at the other locations usually directly tracks the price at the Henry Hub, adjusted for transportation costs. However, at other locations that are not directly connected to the Henry Hub or where shipping capacity is limited, the prices at those locations often diverge from the Henry Hub price. Furthermore, one local price may be significantly different than the price at another location even though the two markets' respective distances from the Henry Hub are the same. The reason for such pricing disparities is that a given location may experience supply and demand factors that are specific to that region, such as differences in pipeline shipping capacity, unusually high or low demand for heating or cooling or supply disruptions caused by severe weather. As a consequence, local natural gas prices can differ from the Henry Hub price by more than the cost of shipping and such price differences can vary in an unpredictable manner.

The Chicago hub, operated by Nicor, Inc., serves as an interconnection point for eight interstate pipelines. The firms that service the Chicago area are ANR Pipeline Company, Natural Gas Pipeline Company of America, Northern Border Pipe Line, Northern Natural Gas Company, Midwestern Gas Transmission Company, Alliance Pipeline, Panhandle Eastern Pipeline Company, and Horizon Pipeline.[15] The Chicago Market Center, which includes the Chicago hub, had an estimated throughput capacity of 100 million cubic feet per day in 2008. Moreover, the number of pipeline interconnections at the Chicago Market Center was eight in 2008, up from seven in 2003. Lastly, the pipeline interconnection capacity of the Chicago Market Center in 2008 was 2.4 billion cubic feet per day, which constituted a 9 percent increase over the pipeline interconnection capacity in 2003.[16] The Chicago hub is far removed from the Henry Hub but is not directly connected to the Henry Hub by an existing pipeline.

The local price at the Chicago hub typically differs from the price at the Henry Hub. Thus, the price of the Henry Hub physically-delivered futures contract is an imperfect proxy for the Chicago price. Moreover, exogenous factors, such as adverse weather, can cause the Chicago gas price to differ from the Henry Hub price by an amount that is more or less than the cost of shipping, making the NYMEX Henry Hub futures contract even less precise as a hedging tool than desired by market participants. Basis contracts[17] allow traders to more accurately discover prices at alternative locations and hedge price risk that is associated with natural gas at such locations. In this regard, a position at a local price for an alternative location can be established by adding the appropriate basis swap position to a position taken in the NYMEX physically-delivered Henry Hub contract (or in the NYMEX or ICE Henry Hub look-alike contract, which cash settle based on the NYMEX physically-delivered natural gas contract's final settlement price).

In its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as the potential SPDC criteria applicable to the DGD contract. Each of these criteria is discussed below.[18]

1. Material Price Reference Criterion.

The Commission's October 9, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission considered the fact that ICE maintains exclusive rights over IPI's bidweek price indices. As a result, no other exchange can offer such a basis contract based on IPI's Chicago bidweek index. While other third-party price providers produce natural gas price indices for this and other trading centers, market participants indicate that the IPI Chicago bidweek index is highly regarded for this particular location and should market participants wish to establish a hedged position based on this index, they would need to do so by taking a position in the ICE DGD swap since ICE has the right to the IPI index for cash settlement purposes. In addition, ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "Midcontinent Gas End of Day" and "OTC Gas End of Day"[19] packages with access to all price data or just current prices plus a selected number of months (i.e., 12, 24, 36 or 48 months) of

[13] The term "hub" refers to a juncture where two or more natural gas pipelines are connected. Hubs also serve as pricing points for natural gas at the particular locations.

[14] See *http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[15] *See http://www.nicor.com/en_us/commercial/gas_xchange/chicago_hub.htm.*

[16] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf*

[17] Basis contracts denote the difference in the price of natural gas at a specified location minus the price of natural gas at the Henry Hub. The differential can be either a positive or negative value.

[18] As noted above, the Commission did not find an indication of arbitrage in connection with this contract; accordingly, that criterion was not discussed in reference to the DGD contract.

[19] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

historical data. These two packages include price data for the DGD contract.

The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.[20] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

The Chicago hub is a particularly important trading center and pricing point for natural gas in the United States. It is one of only two market centers (the other is ANR's Joliet Hub) located in the Midwest region. The Chicago Hub is strategically located at a point where eight major interstate pipelines transporting natural gas from Canada, the Southwest, and the Gulf of Mexico converge. In particular, it is linked with three pipelines that also transport gas from the Henry Hub in Louisiana. As a result, Chicago prices are often compared with those at the Henry Hub in analyzing bias differences between the two points during heavy demand periods.[21]

Traders, including producers, keep abreast of the prices of the DGD contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of natural gas at the Chicago hub when entering into cash market transaction for natural gas, especially those trades providing for physical delivery in the future. Traders use the ICE DGD contract, as well as other ICE basis swap contracts, to hedge cash market positions and transactions—activities which enhance the DGD contract's price discovery utility. The substantial volume of trading and open interest in the DGD contract appears to attest to its use for this purpose. While the DGD contract's settlement prices may not be the only factor influencing spot and forward transactions, natural gas traders consider the ICE price to be a critical factor in conducting OTC transactions.[22] As a result, the DGD contract satisfies the direct price reference test.

In terms of indirect price reference, ICE sells the DGD contract's prices as part of a broad package. The Commission notes that the Chicago hub is a major natural gas trading point, and the DGD contract's prices are well regarded in the industry as indicative of the value of natural gas at the Chicago hub. Accordingly, the Commission believes that it is reasonable to conclude that market participants are purchasing the data packages that include the DGD contract's prices in substantial part because the DGD contract prices have particular value to them. Moreover, such prices are consulted on a frequent and recurring basis by industry participants in pricing cash market transactions. In light of the above, the DGD contract meets the indirect price reference test.

NYMEX lists a futures contract that is comparable to the ICE DGD contract on its ClearPort platform. However, unlike the ICE contract, none of the trades in the NYMEX, Chicago Basis Swap (Platts IFERC) futures contract are executed in NYMEX's centralized marketplace. Instead, all of the transactions originate as bilateral swaps that are submitted to NYMEX for clearing. The daily settlement prices of the NYMEX Chicago Basis Swap futures contract are influenced, in part, by the daily settlement prices of the ICE DGD contract. This is because NYMEX determines the daily settlement prices for its natural gas basis swap contracts through a survey of cash market voice brokers. Voice brokers, in turn, refer to the ICE DGD price, among other information, as an important indicator as to where the market is trading. Therefore, the ICE DGD price influences the settlement price for the NYMEX Chicago Basis Swap futures contract. This is supported by an analysis of the daily settlement prices for the NYMEX and ICE Chicago contracts. In this regard, 97 percent of the daily settlement prices for the NYMEX Chicago Basis Swap futures contract are within one standard deviation of the DGD contract's price settlement prices.

Lastly, the fact that the DGD contract does not meet the price linkage criterion (discussed below) bolsters the argument for material price reference. As noted above, the Henry Hub is the pricing reference for natural gas in the United States. However, regional market conditions may cause the price of natural gas in another area of the country to diverge by more than the cost of transportation, thus making the Henry Hub price an imperfect proxy for the local gas price. The more variable the local natural gas price is, the more traders need to accurately hedge their price risk. Basis swap contracts provide a means of more accurately pricing natural gas at a location other than the Henry Hub. An analysis of Chicago natural gas prices showed that 47 percent of the observations were more than 2.5 percent different than the contemporaneous Henry Hub prices. The average Chicago basis value between January 2008 and September 2009 was −$0.06 per mmBtu with a variance of $0.04 per mmBtu.

i. **Federal Register** Comments

ICE stated in its comment letter that the DGD contract does not meet the material price reference criterion for SPDC determination. ICE argued that the Commission appeared to base the case that the DGD contract is potentially a SPDC on two disputable assertions. First, in issuing its notice of intent to determine whether the DGD contract is a SPDC, the CFTC cited a general conclusion in its ECM study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts."[23] ICE states that CFTC's conclusion is "hard to quantify as the ECM report does not mention" this contract as a potential SPDC. "It is unknown which market participants made this statement in 2007 or the contracts that were referenced."[24] In response to the above comment, the Commission notes that it cited the ECM study's general finding

[20] 17 CFR part 36, Appendix A.

[21] *http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2003/market_hubs/mkthubsweb.html*

[22] In addition to referencing ICE prices, natural gas market firms participating in the Chicago market may rely on other cash market quotes as well as industry publications and price indices that are published by third-party price reporting firms when entering into natural gas transactions.

[23] CL 03.

[24] CL 03.

that some ICE natural gas contracts appear to be regarded as price discovery markets merely as an indicia that an investigation of certain ICE contracts may be warranted. The ECM Study was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

Second, ICE argued that the Commission should not base a determination that the DGD contract is a SPDC on the fact that this contract has the exclusive right to base its settlement on the IPI Chicago Index price. While the Commission acknowledges that there are other firms that produce price indices for the Chicago market, as it notes above, market participants indicate that the IPI Index is very highly regarded and should they wish to establish a hedged position based on this index, they would need to do so by taking a position in the ICE DGD swap since ICE has the exclusive right to use the IPI index.[25]

WGCEF, NGSA, EI and FIEG all stated that the DGD contract does not satisfy the material price reference criterion. The commenters argued that other contracts (physical or financial) are not indexed basis the ICE DGD contract price, but rather are indexed based on the underlying cash price series against which the ICE DGD contract is settled. Thus, they contend that the underlying cash price series is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too limiting in that it only considers the final index value on which the contract is cash settled after trading ceases. Instead, the Commission believes that a cash-settled derivatives contract could meet the price reference criteria if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements.

As noted above, the Chicago market is a major trading center for natural gas in North America. Traders, including producers, keep abreast of the prices of the DGD contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of natural gas at Chicago when entering into cash market transaction for natural gas, especially those trades that provide for physical delivery in the future. Traders use the ICE DGD contract to hedge cash market positions and transactions, which enhances the DGD contract's price discovery utility. While the DGD contract's settlement prices may not be the only factor influencing spot and forward transactions, natural gas traders consider the ICE price to be a crucial factor in conducting OTC transactions.

Both EI and WGCEF stated that publication of price data in a package format is a weak justification for material price reference. These commenters argue that market participants generally do not purchase ICE data sets for one contract's prices, such as those for the DGD contract. Instead, traders are interested in the settlement prices, so the fact that ICE sells the DGD prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the DGD prices have substantial value to them. The Commission notes that the Chicago hub is a major natural gas trading point, and the DGD contract's prices are well regarded in the industry as indicative of the value of natural gas at Chicago. Accordingly, the Commission believes that it is reasonable to conclude that market participants are purchasing the data packages that include the DGD contract's prices in substantial part because the DGD contract prices have particular value to them.

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the DGD contract meets the material price reference criterion because cash market transactions are being priced on a frequent and recurring basis at a differential to the DGD contract's price (direct evidence). Moreover, the ECM (*i.e.,* ICE) sells the DGD contract's price data to market participants and it is reasonable to conclude that market participants are purchasing the data packages that include the DGD contract's prices in substantial part because the DGD contract prices have particular value to them. Furthermore, such prices are consulted on a frequent and reoccurring basis by industry participants in pricing cash market transactions (indirect evidence).

2. Price Linkage Criterion.

In its October 9, 2009, **Federal Register** notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the DGD contract. In this regard, the final settlement of the DGD contract is based, in part, on the final settlement price of NYMEX's physically-delivered natural gas futures contract, where NYMEX is registered with the Commission as a DCM.

The Commission's Guidance on Significant Price Discovery Contracts [26] notes that a "price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract." Furthermore, the Guidance notes that, "[f]or a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract. The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract." Furthermore, the Guidance proposes a threshold price relationship such that prices of the ECM linked contract will fall within a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement or other daily prices over the most recent quarter. Finally, the Commission also stated in the Guidance that it would consider a linked contract that has a trading volume equivalent to 5 percent of the volume of trading in the contract to which it is linked to have sufficient volume potentially to be deemed a SPDC ("minimum threshold").

To assess whether the DGD contract meets the price linkage criterion, Commission staff obtained price data from ICE and performed the statistical tests cited above. Staff found that while the Chicago price is determined, in part, by the final settlement price of the NYMEX physically-delivered natural gas futures contract (a DCM contract), the Chicago price is not within 2.5 percent of the settlement price of the corresponding NYMEX Henry Hub natural gas futures contract on 95 percent of the days. Specifically, during the third quarter of 2009, 53 percent of

[25] Futures and swaps based on other Chicago indices have not met with the same market acceptance as the DGD contract. For example, NYMEX lists a basis swap contract that is comparable to the DGD contract with the exception that it uses a different price index for cash settlement. Open interest as of September 30, 2009, was approximately 19,000 contracts in the NYMEX Chicago Basis Swap contract versus about 134,000 contracts in ICE's DGD contract. Moreover, there has been no centralized-market trading in the NYMEX Chicago Basis Swap contract, so that contract does not serve as a source of price discovery for cash market traders with natural gas at that location.

[26] Appendix A to the Part 36 rules.

the Chicago natural gas prices derived from the ICE basis values were within 2.5 percent of the daily settlement price of the NYMEX Henry Hub futures contract. In addition, staff finds that the DGD contract fails to meet the volume threshold requirement. In particular, the total trading volume in the NYMEX Natural Gas contract during the third quarter of 2009 was 14,022,963 contracts, with 5 percent of that number being 701,148 contracts. The number of trades on the ICE centralized market in the DGD contract during the same period was 63,499 contracts (equivalent to 15,875 NYMEX contracts, given the size difference).[27] Thus, centralized-market trades in the DGD contract amounted to less than the minimum threshold.

Due to the specific criteria that a given ECM contract must meet to fulfill the price linkage criterion, the requirements, for all intents and purposes, exclude ECM contracts that are not near facsimiles of DCM contracts. That is, even though an ECM contract may specifically use a DCM contract's settlement price to value a position, which is the case of the DGD contract, a substantive difference between the two price series would rule out the presence of price linkage. In this regard, an ECM contract that is priced and traded as if it is a functional equivalent of a DCM contract likely will have a price series that mirrors that of the corresponding DCM contract. In contrast, for contracts that are not look-alikes of DCM contracts, it is reasonable to expect that the two price series would be divergent. The Chicago hub and the Henry Hub are located in two different areas of the United States. The Henry Hub primarily is a supply center while Chicago primarily is a demand center. These differences contribute to the divergence between the two price series and, as discussed below, increase the likelihood that the "basis" contract is used for material price reference.

i. **Federal Register** Comments

NGSA [28] stated that the DGD contract does not meet the price linkage criterion because basis contracts, including the DGD contract, are not equivalent to the NYMEX physically-delivered Henry Hub contract. EI [29] also noted that the DGD and NYMEX natural gas contracts are not economically equivalent and that the DGD contract's volume is too low to affect the NYMEX natural gas futures contract. WGCEF [30] stated that the Chicago price is determined, in part, by the final settlement price of the NYMEX Henry Hub futures contract. However, WGCEF goes on to state that the DGD contract "(a) is not substantially the same as the NYMEX [natural gas futures contract] * * * nor (b) does it move substantially in conjunction" with the NYMEX natural gas futures contract. ICE [31] opined that the DGD contract's trading volume is too low to affect the price discovery process for the NYMEX natural gas futures contract. In addition, ICE states that the DGD contract simply reflects a price differential between Chicago hub and the Henry Hub; "there is no price linkage as contemplated by Congress or the CFTC in its rulemaking." FIEG [32] acknowledged that the DGD contract is a locational spread that is based in part on the NYMEX natural gas futures price, but also questioned the significance of this fact relative to the price linkage criterion since the key component of the spread is the price at the Chicago hub and not the NYMEX physically-delivered natural gas futures price.

ii. Conclusion Regarding the Price Linkage Criterion

Based on the above, the Commission finds that the DGD contract does not meet the price linkage criterion because it fails the price relationship and volume tests provided for in the Commission's Guidance.

3. Material Liquidity Criterion.

To assess whether the DGD contract meets the material liquidity criterion, the Commission first examined volume and open interest data provided to it by ICE as a general measurement of the DGD market's size and potential importance, and second performed a statistical analysis to measure the effect that changes to DGD prices potentially may have on prices for the NYMEX Henry Hub Natural Gas (a DCM contract), the ICE Permian Financial Basis contract (an ECM contract), ICE Waha Financial Basis contract (an ECM contract) and ICE NGPL TxOk Financial Basis contract (an ECM contract).[33]

The Commission's Guidance (Appendix A to Part 36) notes that "[t]raditionally, objective measures of trading such as volume or open interest have been used as measures of liquidity." In this regard, the Commission in its October 9, 2009, **Federal Register** notice referred to second quarter 2009 trading statistics that ICE had submitted for its DGD contract. Based upon on a required quarterly filing made by ICE on July 27, 2009, the total number of DGD trades executed on ICE's electronic trading platform was 1,572 in the second quarter of 2009, resulting in a daily average of 24.6 trades. During the same period, the DGD contract had a total trading volume on ICE's electronic trading platform of 146,193 contracts and an average daily trading volume of 2,284,3 contracts. Moreover, the open interest as of June 30, 2009, was 127,744 contracts, which includes trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.[34]

Subsequent to the October 9, 2009, **Federal Register** notice, ICE submitted another quarterly notification filed on November 13, 2009,[35] with updated trading statistics. Specifically, with respect to its DGD contract, 782 separate trades occurred on its electronic platform in the third quarter of 2009, resulting in a daily average of 11.8 trades. During the same period, the DGD contract had a total trading volume on its electronic platform of 63,499 contracts (which was an average of 962 contracts per day).[36] As of September 30, 2009, open interest in the DGD contract was 134,031 [37] contracts. Reported open interest included positions resulting from trades that were executed on ICE's electronic platform, as well as trades that were executed off of ICE's electronic platform and brought to ICE for clearing.

In the Guidance, the Commission stated that material liquidity can be identified by the impact liquidity exhibits through observed prices. Thus, to make a determination whether the DGD contract has such material impact, the Commission reviewed the relevant

[27] The DGD contract is one-quarter the size of the NYMEX Henry Hub physically-delivered futures contract.

[28] CL 05.

[29] CL 04.

[30] CL 02.

[31] CL 03.

[32] CL 07.

[33] As noted above, the material liquidity criterion speaks to the effect that transactions in the potential SPDC may have on trading in "agreements, contracts and transactions listed for trading on or subject to the rules of a designated contract market, a derivatives transaction execution facility, or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act."

[34] ICE does not differentiate between open interest created by a transaction executed on its trading platform versus that created by a transaction executed off its trading platform.

[35] See Commission Rule 36.3(c)(2), 17 CFR 36.3(c)(2).

[36] By way of comparison, the number of contracts traded in the DGD contract is similar to that exhibited on a liquid futures market and is roughly equivalent to the volume of trading for the Chicago Board of Trade's Oats contract during this period.

[37] By way of comparison, open interest in the DGD contract is similar to that exhibited on a liquid futures market and is roughly equivalent to that in the Chicago Board of Trade's soybean meal futures contract.

trading statistics (noted above). In this regard, the average number trades per day in the second and third quarters of 2009 were above the minimum reporting level (5 trades per day). Moreover, trading activity in the DGD contract, as characterized by total quarterly volume, indicates that the DGD contract experiences trading activity similar to that of other thinly-traded contracts.[38] However, the DGD contract has substantial open interest. This factor coupled with the importance of this trading center as a price reference point, makes it reasonable to infer that the DGD contract could have a material effect on other ECM contracts or on DCM contracts.

To measure the effect that the DGD contract potentially could have on a DCM contract, or on another ECM contract, Commission staff performed a statistical analysis[39] using daily settlement prices (between January 2, 2008, and September 30, 2009) for the DGD contract, as well as for the NYMEX Henry Hub natural gas contract (a DCM contract) and the ICE Waha Financial Basis, ICE Permian Financial Basis and ICE NGPL TxOk Financial Basis contracts (ECM contracts). The simulation results suggest that, on average over the sample period, a one percent rise in the DGD contract's price elicited a 1 percent increase in each of the other contracts' prices.

i. **Federal Register** Comments

As noted above, comments were received from seven individuals and organizations, with five comments being directly applicable to the SPDC determination of the ICE DGD contract. WGCEF, EI, FIEG, ICE and NGSA generally agreed that the DGD contract does not meet the material liquidity criterion.

WGCEF[40] and NGSA[41] both stated that the DGD contract does not materially affect other contracts that are listed for trading on DCMs or ECMs, as well as other over-the-counter contracts. Instead, the DGD contract is influenced by the underlying Chicago cash price index and the final settlement price of the NYMEX Henry Hub natural gas futures contract, not vice versa. FIEG[42] stated that the DGD contract cannot have a material effect on NYMEX contract because the DGD contract trades on a differential and represents "one leg (and not the relevant leg) of the locational spread." The Commission's statistical analysis shows that changes in the ICE DGD contract's price significantly influences the prices of other contracts that are traded on DCMs and ECMs.

First, ICE opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to report trade data to the CFTC." In this regard, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs" rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC. As noted above, the Commission is basing a finding of material liquidity for the ICE DGD contract, in part, on the fact that the Chicago hub is an important pricing point and changes in the DGD contract's prices significantly affect those of other ECM contracts and DCM contracts. The DGD contract also has significant open interest.

ICE implied that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all [72] months of * * * [the] contract" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a single traded month or strip of a given contract." ICE stated that only about 25 to 40 percent of the trades occurred in the single most liquid, usually prompt, month of the contract.

It is the Commission's opinion that liquidity, as it pertains to the DGD contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the DGD contract itself would be considered liquid. ICE's analysis of its own trade data confirms this to be the case for the DGD contract, and thus, the Commission believes that it applied the statistical data cited above in an appropriate manner for gauging material liquidity.

In addition, EI and ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which are cited above includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. Commission staff asked ICE to review the data it sent in its quarterly filings. In response, ICE confirmed that the volume data it provided and which the Commission cited in its October 9, 2009, **Federal Register** notice, as well as the additional volume information it cites above, includes only transaction data executed on ICE's electronic trading platform. The Commission acknowledges that the open interest information it cites above includes transactions made off the ICE platform.[43] However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

ii. Conclusion Regarding Material Liquidity

Based on the above, the Commission concludes that the DGD contract meets the material liquidity criterion in that there is sufficient trading activity in the DGD contract to have a material effect on "other agreements, contracts or transactions listed for trading on or subject to the rules of a designated contract market * * * or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act" (that is, an ECM).

[38] Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

[39] Specifically, Commission staff econometrically estimated a vector autoregression (VAR) model using daily settlement prices. A vector autoregression model is an econometric model used to capture the evolution and the interdependencies between multiple time series, generalizing the univariate autoregression models. The estimated model displays strong diagnostic evidence of statistical adequacy. In particular, the model's impulse response function was shocked with a one-time rise in DGD contract's price. The simulation results suggest that, on average over the sample period, a one percent rise in the DGD contract's price elicited a 1percent increase in the NYMEX Henry Hub and the ICE NGPL TxOk, Permian and Waha prices. These multipliers of response emerge with noticeable statistical strength or significance. Based on such long run sample patterns, if the DGD contract's price rises by 10 percent, then the price of the other contracts each would rise by about 10 percent.

[40] CL 02.

[41] CL 05.

[42] CL 07.

[43] Supplemental data supplied by the ICE confirmed that block trades in the third quarter of 2009 were in addition to the trades that were conducted on the electronic platform; block trades comprised 64 percent of all transactions in the DGD contract.

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the DGD contract performs a significant price discovery function under two of the four criteria established in section 2(h)(7) of the CEA. Although the Commission has determined that the DGD contract does not meet the price linkage criterion at this time, the Commission has concluded that the DGD contract does meet both the material liquidity and material price reference criteria. Accordingly, the Commission is issuing the attached Order declaring that the DGD contract is a SPDC.

Issuance of this Order signals the immediate effectiveness of the Commission's authorities with respect to ICE as a registered entity in connection with its DGD contract,[44] and triggers the obligations, requirements—both procedural and substantive—and timetables prescribed in Commission rule 36.3(c)(4) for ECMs.

V. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")[45] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA[46] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act. The Commission has considered the costs and benefits in light of the specific provisions of section 15(a) of the Act and has concluded that the Order, required by Congress to strengthen federal oversight of exempt commercial markets and to prevent market manipulation, is necessary and appropriate to accomplish the purposes of section 2(h)(7) of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order finding that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Section 4(i) of the CEA authorizes the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")[47] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect ECMs. The Commission previously has determined that ECMs are not small entities for purposes of the RFA.[48] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Order, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

VI. Order

a. Order Relating to the Chicago Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Chicago Financial Basis contract, traded on the IntercontinentalExchange, Inc., satisfies the statutory material liquidity and material price reference criteria for significant price discovery contracts. Consistent with this determination, and effective immediately, the IntercontinentalExchange, Inc., must comply with, with respect to the Chicago Financial Basis contract, the nine core principles established by new section 2(h)(7)(C). Additionally, the IntercontinentalExchange, Inc., shall be and is considered a registered entity[49] with respect to the Chicago Financial Basis contract and is subject to all the provisions of the Commodity Exchange Act applicable to registered entities.

Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., commence with the issuance of this Order.[50]

Issued in Washington, DC on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–10344 Filed 5–4–10; 8:45 am]

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[44] See 73 FR 75888, 75893 (Dec. 12, 2008).

[45] 44 U.S.C. 3507(d).

[46] 7 U.S.C. 19(a).

[47] 5 U.S.C. 601 *et seq.*

[48] 66 FR 42256, 42268 (Aug. 10, 2001).

[49] 7 U.S.C. 1a(29).

[50] Because ICE already lists for trading a contract (i.e., the Henry Financial LD1 Fixed Price contract) that was previously declared by the Commission to be a SPDC, ICE must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of this Order. 17 CFR 36.3(c)(4).

COMMODITY FUTURES TRADING COMMISSION

Order Finding That the HSC[1] Financial Basis Contract Traded on the IntercontinentalExchange, Inc., Performs a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final Order.

SUMMARY: On October 9, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register**[2] a notice of its intent to undertake a determination whether the HSC Financial Basis ("HXS") contract, traded on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)—(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function pursuant to section 2(h)(7) of the CEA.[3] The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue an order finding that the HXS contract performs a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective Date:* April 28, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act")[4] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[5] The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[6] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily prices of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[7] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[8]

II. Notice of Intent To Undertake SPDC Determination

On October 9, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the HXS contract performs a significant price discovery function, and requested comment from interested parties.[9] Comments were received from the Industrial Energy Consumers of America ("IECA"), Working Group of Commercial Energy Firms ("WGCEF"), Platts, ICE, Economists Incorporated ("EI"), Natural Gas Supply Association ("NGSA"), Federal Energy Regulatory Commission ("FERC"), and Financial Institutions Energy Group ("FIEG").[10] The comment

[1] HSC refers to the Houston Ship Channel, a conduit for ocean going vessels between the city of Houston, Texas, and the Gulf of Mexico.

[2] 74 FR 52206 (October 9, 2009).

[3] 7 U.S.C. 1a(29).

[4] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law No. 110–246, 122 Stat. 1624 (June 18, 2008).

[5] 7 U.S.C. 1a(29).

[6] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[7] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). See also 73 FR 75888, 75894 (Dec. 12, 2008).

[8] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[9] The Commission's Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

[10] IECA describes itself as an "association of leading manufacturing companies" whose membership "represents a diverse set of industries including: plastics, cement, paper, food processing, brick, chemicals, fertilizer, insulation, steel, glass, industrial gases, pharmaceutical, aluminum and brewing." WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." McGraw-Hill, through its division Platts, compiles and calculates monthly natural gas price indices from natural gas trade data submitted to Platts by energy marketers. Platts

Continued

letters from FERC [11] and Platts did not directly address the issue of whether or not the HXS contract is a SPDC; IECA concluded that the HXS contract is a SPDC, but did not provide a basis for its conclusion.[12] The other parties' comments raised substantive issues with respect to the applicability of section 2(h)(7) to the HXS contract, generally asserting that the HXS contract is not a SPDC as it does not meet the material liquidity, material price reference and price linkage criteria for SPDC determination. Those comments are more extensively discussed below, as applicable.

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.
- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.
- *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[13] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[14] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

IV. Findings and Conclusions

a. The HSC Financial Basis (HXS) Contract and the SPDC Indicia

The HXS contract is cash settled based on the difference between the price of natural gas at the HSC for the month of delivery, as published in Platts' *Inside FERC's Gas Market Report,* and the final settlement price of the New York Mercantile Exchange's ("NYMEX's") Henry Hub physically-delivered natural gas futures contract for the same specified calendar month. The Platts bidweek price, which is published monthly, is based on a survey of cash market traders who voluntarily report to Platts data on fixed-price transactions for physical delivery of natural gas at the HSC conducted during the last five business days of the month; such bidweek transactions specify the delivery of natural gas on a uniform basis throughout the following calendar month at the agreed upon rate. The Platt's bidweek index is published on the first business day of the calendar month in which the natural gas is to be delivered. The size of the HXS contract is 2,500 million British thermal units ("mmBtu"), and the unit of trading is any multiple of 2,500 mmBtu. The HXS contract is listed for up to 84 calendar months commencing with the next calendar month.

The Henry Hub,[15] which is located in Erath, Louisiana, is the primary cash market trading and distribution center for natural gas in the United States. It also is the delivery point and pricing basis for the NYMEX's actively traded, physically-delivered natural gas futures contract, which is the most important pricing reference for natural gas in the United States. The Henry Hub, which is operated by Sabine Pipe Line, LLC, serves as a juncture for 13 different

includes those price indices in its monthly *Inside FERC's Gas Market Report* ("Inside FERC"). ICE is an ECM, as noted above. EI is an economic consulting firm with offices located in Washington, DC, and San Francisco, CA. NGSA is an industry association comprised of natural gas producers and marketers. FERC is an independent federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, "including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors." The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09–019.html*

[11] FERC stated that the HXS contract is cash settled and does not contemplate actual physical delivery of natural gas. Accordingly, FERC expressed the opinion that a determination by the Commission that a contract performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Natural Gas Act (NGA) over certain sales of natural gas in interstate commerce for resale or with its other regulatory responsibilities under the NGA" and further that, "the FERC staff will continue to monitor for any such conflict * * * [and] advise the CFTC" should any such potential conflict arise. CL 07.

[12] IECA stated that the subject ICE contract should "be required to come into compliance with core principles mandated by Section 2(h)(7) of the Act and with other statutory provisions applicable to registered entities. [This contract] should be subject to the Commission's position limit authority, emergency authority and large trader reporting requirements, among others." CL 01.

[13] In its October 9, 2009, **Federal Register** release, the Commission identified material price reference, price linkage and material liquidity as the possible criteria for SPDC determination of the HXS contract. Arbitrage was not identified as a possible criterion and will not be discussed further in this document or the associated Order.

[14] 17 CFR part 36, Appendix A.

[15] The term "hub" refers to a juncture where two or more natural gas pipelines are connected. Hubs also serve as pricing points for natural gas at the particular locations.

pipelines. These pipelines bring in natural gas from fields in the Gulf Coast region and ship it to major consumption centers along the East Coast and Midwest. The throughput shipping capacity of the Henry Hub is 1.8 trillion mmBtu per day.

In addition to the Henry Hub, there are a number of other locations where natural gas is traded. In 2008, there were 33 natural gas market centers in North America.[16] Some of the major trading centers include Alberta, Northwest Rockies, Southern California border and the HSC. For locations that are directly connected to the Henry Hub by one or more pipelines and where there typically is adequate shipping capacity, the price at the other locations usually directly tracks the price at the Henry Hub, adjusted for transportation costs. However, at other locations that are not directly connected to the Henry Hub or where shipping capacity is limited, the prices at those locations often diverge from the Henry Hub price. Furthermore, one local price may be significantly different than the price at another location even though the two markets' respective distances from the Henry Hub are the same. The reason for such pricing disparities is that a given location may experience supply and demand factors that are specific to that region, such as differences in pipeline shipping capacity, unusually high or low demand for heating or cooling or supply disruptions caused by severe weather. As a consequence, local natural gas prices can differ from the Henry Hub price by more than the cost of shipping and such price differences can vary in an unpredictable manner.

The HSC is part of the Port of Houston and, as noted above, serves as a conduit between the Gulf of Mexico and the city of Houston, Texas, which is one of the largest industrial natural gas consuming areas in the United States. The 4,200-mile Houston Pipeline, with a capacity of approximately 2.4 billion cubic feet per day, connects local gas distribution companies, electric generation plants and industrial consumers to one of the largest domestic supply basins in Texas.[17] The Houston Pipeline Company serves the HSC market, the city of Houston, the Katy Hub, Beaumont/Port Arthur complex, Texas City and Corpus Christi and includes the Bammel Gas Storage Facility, one of the largest underground reservoir storage fields in North America with 118 billion cubic feet of natural gas storage capacity.[18] The cash market transactions included in the Platts index are those for fixed-price gas deliveries extending from the east side of Houston to Galveston Bay and northeastward to the Port Arthur/Beaumont, Texas, area. While the HSC shares some of the same market fundamentals as the Henry Hub, prices at the HSC are reflective of the local market, which is driven by Houston's industrial consumers.

The local price at the HSC typically differs from the price at the Henry Hub. Thus, the price of the Henry Hub physically-delivered futures contract is an imperfect proxy for the HSC price. Moreover, despite the proximity of the HSC to the Henry Hub, exogenous factors such as severe weather events can cause the HXS gas price to differ from the Henry Hub price by an amount that is more or less than the cost of shipping, making the NYMEX Henry Hub futures contract even less precise as a hedging tool than desired by market participants. Basis contracts[19] allow traders to more accurately discover prices at alternative locations and hedge price risk that is associated with natural gas at such locations. In this regard, a position at a local price for an alternative location can be established by adding the appropriate basis swap position to a position taken in the NYMEX physically-delivered Henry Hub contract (or in the NYMEX or ICE Henry Hub look-alike contract, which cash settle based on the NYMEX physically-delivered natural gas contract's final settlement price).

In its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as the potential SPDC criteria applicable to the HXS contract. Each of these criteria is discussed below.[20]

1. Material Price Reference Criterion.

The Commission's October 9, 2009, **Federal Register** notice identified material price reference as a potential basis for an SPDC determination with respect to this contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers "Gulf Gas End of Day" and "OTC Gas End of Day"[21] with access to all price data or just current prices plus a selected number of months (*i.e.,* 12, 24, 36 or 48 months) of historical data. These two packages include price data for the HXS contract.

The Commission also noted that its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study")[22] found that in general, market participants view the ICE as a price discovery market for certain natural gas contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the HXS contract, while not mentioned by name in the ECM Study, might warrant further study.

The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a significant price discovery function.[23] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry

[16] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[17] *http://www.aep.com/newsroom/newsreleases/?id=952.*

[18] *http://www.energytransfer.com/midstream_ops.aspx.*

[19] Basis contracts denote the difference in the price of natural gas at a specified location minus the price of natural gas at the Henry Hub. The differential can be either a positive or negative value.

[20] As noted above, the Commission did not find an indication of arbitrage in connection with this contract; accordingly, that criterion was not discussed in reference to the HXS contract.

[21] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

[22] *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/pr5403-07_ecmreport.pdf.*

[23] 17 CFR part 36, Appendix A.

participants in pricing cash market transactions.

The HSC is a major trading center for natural gas in the United States. Traders, including producers, keep abreast of the prices of the HXS contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of natural gas at the HSC when entering into cash market transaction for natural gas, especially those trades providing for physical delivery in the future. Traders use the ICE HXS contract, as well as other ICE basis swap contracts, to hedge cash market positions and transactions—activities which enhance the HXS contract's price discovery utility. The substantial volume of trading and open interest [24] in the HXS contract appears to attest to its use for this purpose. While the HXS contract's settlement prices may not be the only factor influencing spot and forward transactions, natural gas traders consider the ICE price to be a critical factor in conducting OTC transactions.[25] As a result, the HXS contract satisfies the direct price reference test.

In terms of indirect price reference, ICE sells the HXS contract's prices as part of a broad package. The Commission notes that the HSC is a major natural gas trading point, and the HXS contract's prices are well regarded in the industry as indicative of the value of natural gas at the HSC. Accordingly, the Commission believes that it is reasonable to conclude that market participants are purchasing the data packages that include the HXS contract's prices in substantial part because the HXS contract prices have particular value to them. Moreover, such prices are consulted on a frequent and recurring basis by industry participants in pricing cash market transactions. In light of the above, the HXS contract meets the indirect price reference test.

NYMEX lists a futures contract that is comparable to the ICE HXS contract on its ClearPort platform called the Houston Ship Channel Natural Gas Basis Swap (Platts IFERC) futures contract. However, unlike the ICE HXS contract, none of the trades in the NYMEX version of the contract are executed in NYMEX's centralized marketplace; instead, all of the transactions originate as bilateral swaps that are submitted to NYMEX for clearing. The daily settlement prices of the NYMEX HSC basis swap contract are influenced, in part, by the daily settlement prices of the ICE HXS contract. This is because NYMEX determines the daily settlement prices for its natural gas basis swap contracts through a survey of cash market voice brokers. Voice brokers, in turn, refer to the ICE HXS price, among other information, as an important indicator as to where the market is trading. Therefore, the ICE HXS price influences the settlement price for the NYMEX HSC basis swap contract. This is supported by an analysis of the daily settlement prices for the NYMEX HSC basis swap contract and the ICE HXS contract. In this regard, 96 percent of the daily settlement prices for the NYMEX HSC basis swap contract are within one standard deviation of the HXS contract's price settlement prices.

Lastly, the fact that the HXS contract does not meet the price linkage criterion (discussed below) bolsters the argument for material price reference. As noted above, the Henry Hub is the pricing reference for natural gas in the United States. However, regional market conditions may cause the price of natural gas in another area of the country to diverge by more than the cost of transportation, thus making the Henry Hub price an imperfect proxy for the local gas price. The more variable the local natural gas price is, the more traders need to accurately hedge their price risk. Basis swap contracts provide a means of more accurately pricing natural gas at a location other than the Henry Hub. An analysis of HSC natural gas prices (based on the HXS contract's settlement prices) showed that 64.6 percent of the observations were more than 2.5 percent different that the contemporaneous Henry Hub prices. The average HSC basis value between January 2008 and September 2009 was −$0.26 per mmBtu with a variance of $0.03 per mmBtu.

i. **Federal Register** Comments

ICE stated in its comment letter that the HXS contract does not meet the material price reference criterion for SPDC determination. ICE argued that the Commission appeared to base the case that the HXS contract is potentially a SPDC on what it characterizes as a disputable assertion. In issuing its notice of intent to determine whether the HXS contract is a SPDC, the CFTC cited a general conclusion in its ECM study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts." [26] ICE stated that CFTC's reason is "hard to quantify as the ECM report does not mention" this contract as a potential SPDC. "It is unknown which market participants made this statement *in 2007* or the contracts that were referenced." [27] In response to the above comment, the Commission notes that it cited the ECM study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets merely as indicia that an investigation of certain ICE contracts may be warranted, and were not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

WGCEF,[28] NGSA,[29] EI [30] and FIEG [31] all stated that the HXS contract does not satisfy the material price reference criterion. The commenters argued that other contracts (physical or financial) are not indexed based on the ICE HXS contract price, but rather are indexed based on the underlying cash price series against which the ICE HXS contract is settled. Thus, they contend that the underlying cash price series is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too limiting in that it only considers the final index value on which the contract is cash settled after trading ceases. Instead, the Commission believes that a cash-settled derivatives contract could meet the price reference criterion if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements.

As noted above, the HSC is a major trading center for natural gas in North America. Traders, including producers, keep abreast of the prices of the HXS contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of natural gas at the HSC when entering into cash market transaction for natural gas, especially those trades that provide for physical delivery in the future. Traders use the ICE HXS contract to hedge cash market positions and transactions, which enhances the HXS contract's price discovery utility. While the HXS

[24] *Source:* ICE filings dated July 27, 2009, and November 13, 2009.

[25] In addition to referencing ICE prices, natural gas market firms participating in the HSC market may rely on other cash market quotes as well as industry publications and price indices that are published by third-party price reporting firms in entering into natural gas transactions.

[26] CL 04.

[27] CL 04.

[28] CL 02.

[29] CL 06.

[30] CL 05.

[31] CL 08

contract's settlement prices may not be the only factor influencing spot and forward transactions, natural gas traders consider the ICE price to be a crucial factor in conducting OTC transactions.

Both EI and WGCEF stated that publication of price data in a package format is a weak justification for material price reference. These commenters argue that market participants generally do not purchase ICE data sets for one contract's prices, so the fact that ICE sells the HXS prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the HXS prices have substantial value to them. The Commission notes that the HSC is a major natural gas trading point, and the HXS contract's prices are well regarded in the industry as indicative of the value of natural gas at the HSC. Accordingly, the Commission believes that it is reasonable to conclude that market participants are purchasing the data packages that include the HXS contract's prices in substantial part because the HXS contract prices have particular value to them.

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the HXS contract meets the material price reference criterion because cash market transactions are being priced on a frequent and recurring basis at a differential to the HXS contract's price (direct evidence). Moreover, the ECM sells the HXS contract's price data to market participants and it is reasonable to conclude that market participants are purchasing the data packages that include the HXS contract's prices in substantial part because the HXS contract prices have particular value to them. Furthermore, such prices are consulted on a frequent and recurring basis by industry participants in pricing cash market transactions (indirect evidence).

2. Price Linkage Criterion.

In its October 9, 2009, **Federal Register** notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the HXS contract. In this regard, the final settlement of the HXS contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas futures contract, where the NYMEX is registered with the Commission as a DCM.

The Commission's Guidance on Significant Price Discovery Contracts [32] notes that a "price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract." Furthermore, the Guidance notes that, "[f]or a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract. The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract." Furthermore, the Guidance proposes a threshold price relationship such that prices of the ECM linked contract will fall within a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement or other daily prices over the most recent quarter. Finally, the Commission also stated in the Guidance that it would consider a linked contract that has a trading volume equivalent to 5 percent of the volume of trading in the contract to which it is linked to have sufficient volume potentially to be deemed a SPDC ("minimum threshold").

To assess whether the HXS contract meets the price linkage criterion, Commission staff obtained price data from ICE and performed the statistical tests cited above. Staff found that while the HXS contract's price is determined, in part, by the final settlement price of the NYMEX physically-delivered natural gas futures contract (a DCM contract), the natural gas price at the HSC is not within 2.5 percent of the settlement price of the corresponding NYMEX Henry Hub natural gas futures contract on 95 percent of the days. Specifically, during the third quarter of 2009, only 35.4 percent of the HSC natural gas prices derived from the ICE basis values were within 2.5 percent of the daily settlement price of the NYMEX Henry Hub futures contract. In addition, staff found that the HXS contract fails to meet the volume threshold requirement. In particular, the total trading volume in the NYMEX Natural Gas contract during the third quarter of 2009 was 14,022,963 contracts, with 5 percent of that number being 701,148 contracts. The number of trades on the ICE centralized market in the HXS contract during the same period was 271,056 contracts (equivalent to 67,764 NYMEX contracts, given the size difference).[33] Thus, centralized-market trades in the HXS contract amounted to less than the minimum threshold.

Due to the specific criteria that a given ECM contract must meet to fulfill the price linkage criterion, the requirements, for all intents and purposes, exclude ECM contracts that are not near facsimiles of DCM contracts. That is, even though an ECM contract may specifically use a DCM's contract's settlement price to value a position, which is the case of the HXS contract, a substantive difference between the two price series would rule out the presence of price linkage. In this regard, an ECM contract that is priced and traded as if it is a functional equivalent of a DCM contract likely will have a price series that mirrors that of the corresponding DCM contract. In contrast, for contracts that are not look-alikes of DCM contracts, it is reasonable to expect that the two price series would be divergent. The HSC and the Henry Hub are both located in Gulf Coast region of the United States. The Henry Hub and the HSC are both primarily supply centers, but the latter point is affected by heavy commercial demand in the local area. In contrast, the Henry Hub mainly serves as a distribution point for natural gas that will be consumed at various locations throughout the United States. These differences contribute to the divergence between the two price series and, as discussed below, increase the likelihood that the "basis" contract is used for material price reference.

i. **Federal Register** Comments

NGSA [34] stated that the HXS contract does not meet the price linkage criterion because basis contracts, including the HXS contract, are not equivalent to the NYMEX physically-delivered Henry Hub contract. EI [35] also noted that the HXS and NYMEX natural gas contracts are not economically equivalent and that the HXS contract's volume is too low to affect the NYMEX natural gas futures contract. WGCEF [36] stated that the HXS contract's price is determined, in part, by the final settlement price of the NYMEX Henry Hub futures contract. However, WGCEF goes on to state that the HXS contract "(a) is not substantially the same as the NYMEX [natural gas

[32] Appendix A to the Part 36 rules.

[33] The HXS contract is one-quarter the size of the NYMEX Henry Hub physically-delivered futures contract.

[34] CL 06.

[35] CL 05.

[36] CL 02.

futures contract] * * * nor (b) does it move substantially in conjunction" with the NYMEX natural gas futures contract. ICE [37] pronounced that the HXS contract's trading volume is too low to affect the price discovery process for the NYMEX natural gas futures contract. In addition, ICE stated that the HXS contract simply reflects a price differential between Houston Ship Channel and the Henry Hub; "there is no price linkage as contemplated by Congress or the CFTC in its rulemaking." FIEG [38] acknowledged that the HXS contract is a locational spread that is based in part on the NYMEX natural gas futures price, but also questioned the significance of this fact relative to the price linkage criterion since the key component of the spread is the price at the HSC and not the NYMEX physically-delivered natural gas futures price.

ii. Conclusion Regarding the Price Linkage Criterion

Based on the above, the Commission finds that the HXS contract does not meet the price linkage criterion because it fails the price relationship and volume tests provided for in the Commission's Guidance.

3. Material Liquidity Criterion

To assess whether the HXS contract meets the material liquidity criterion, the Commission first examined volume and open interest data provided to it by ICE as a general measurement of the HXS contract's size and potential importance, and second performed a statistical analysis to measure the effect that changes to HXS prices potentially may have on prices for the NYMEX Henry Hub Natural Gas (a DCM contract), the ICE AECO Financial Basis contract (an ECM contract) and the Socal Border Financial Basis contract (an ECM contract).[39]

The Commission's Guidance (Appendix A to Part 36) notes that "[t]raditionally, objective measures of trading such as volume or open interest have been used as measures of liquidity." In this regard, the Commission in its October 9, 2009, **Federal Register** notice referred to second quarter 2009 trading statistics that ICE had submitted for its HXS contract. Based upon on a required quarterly filing made by ICE on July 27, 2009, the total number of HXS trades executed on ICE's electronic trading platform was 2,524 in the second quarter of 2009, resulting in a daily average of 39.4 trades. During the same period, the HXS contract had a total trading volume on ICE's electronic trading platform of 209,010 contracts and an average daily trading volume of 3,265.8 contracts.[40] Moreover, the open interest as of June 30, 2009, was 313,594 contracts, which includes trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.[41]

Subsequent to the October 9, 2009, **Federal Register** notice, ICE submitted another quarterly notification filed on November 13, 2009 [42] with updated trading statistics. Specifically, with respect to its HXS contract, 2,894 separate trades occurred on its electronic platform in the third quarter of 2009, resulting in a daily average of 43.8 trades. During the same period, the HXS contract had a total trading volume on its electronic platform of 271,056 contracts (which was an average of 4,107 contracts per day). As of September 30, 2009, open interest in the HXS contract was 309,740 contracts. Reported open interest included positions resulting from trades that were executed on ICE's electronic platform, as well as trades that were executed off of ICE's electronic platform and brought to ICE for clearing.

In the Guidance, the Commission stated that material liquidity can be identified by the impact liquidity exhibits through observed prices. Thus, to make a determination whether the HXS contract has such material impact, the Commission reviewed the relevant trading statistics (noted above). In this regard, the average number trades per day in the second and third quarters of 2009 were well above the minimum reporting level (5 trades per day). Moreover, trading activity in the HXS contract, as characterized by total quarterly volume, indicates that the HXS contract experiences greater trading activity than in thinly-traded contracts.[43] Thus, it is reasonable to infer that the HXS contract could have a material effect on other ECM contracts or on DCM contracts.

To measure the effect that the HXS contract potentially could have on a DCM contract, or on another ECM contract, Commission staff performed a statistical analysis [44] using daily settlement prices (between January 2, 2008, and September 30, 2009) for the ICE HXS contract, as well as for the NYMEX Henry Hub natural gas contract (a DCM contract), the ICE AECO Financial Basis and Socal Financial Basis contracts (ECM contracts). The simulation results suggest that, on average over the sample period, a one percent rise in the HXS contract's price elicited a nearly equivalent increase in each of the NYMEX Henry Hub, ICE AECO and ICE Socal Border prices.

i. **Federal Register** Comments

As noted above, comments were received from seven individuals and organizations, with five comments being directly applicable to the SPDC determination of the ICE HXS contract. WGCEF, EI, FIEG, ICE and NGSA generally agreed that the HXS contract does not meet the material liquidity criterion.

WGCEF [45] and NGSA [46] both stated that the HXS contract does not materially affect other contracts that are listed for trading on DCMs or ECMs, as well as other over-the-counter contracts. Instead, the HXS contract is influenced by the underlying HSC cash price index

[37] CL 04.

[38] CL 08.

[39] As noted above, the material liquidity criterion speaks to the effect that transactions in the potential SPDC may have on trading in "agreements, contracts and transactions listed for trading on or subject to the rules of a designated contract market, a derivatives transaction execution facility, or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act."

[40] The volume of trading was comparable to that of the Chicago Mercantile Exchange Feeder Cattle futures contract and the NYMEX Platinum futures contract for the same period.

[41] ICE does not differentiate between open interest created by a transaction executed on its trading platform versus that created by a transaction executed off its trading platform. The size of the HXS open interest was comparable to that of the NYMEX No. 2 Heating Oil futures and the CME Live Cattle futures contracts for the same period.

[42] See Commission Rule 36.3(c)(2), 17 CFR 36.3(c)(2).

[43] Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

[44] Specifically, the Commission econometrically estimated a vector autoregression (VAR) model using daily settlement prices. A vector autoregression model is an econometric model used to capture the evolution and the interdependencies between multiple time series, generalizing the univariate autoregression models. The estimated model displays strong diagnostic evidence of statistical adequacy. In particular, the model's impulse response function was shocked with a one-time rise in HXS contract's price. The simulation results suggest that, on average over the sample period, a one percent rise in the HXS contract's price elicited a 0.98 percent increase in the NYMEX Henry Hub and Socal Border prices, as well as 0.91 percent increase in the AECO price. These multipliers of response emerge with noticeable statistical strength or significance. Based on such long run sample patterns, if the HXS contract's price rises by 10 percent, then the prices of NYMEX Henry Hub natural gas futures contract and Socal Border Financial Basis contract would each rise by 9.1 percent, and the price of the AECO Financial Basis contract would rise by 9.8 percent.

[45] CL 02.

[46] CL 06.

and the final settlement price of the NYMEX Henry Hub natural gas futures contract, not vice versa. FIEG [47] stated that the HXS contract cannot have a material effect on NYMEX contract because the HXS contract trades on a differential and represents "one leg (and not the relevant leg) of the locational spread." The Commission's statistical analysis shows that changes in the ICE HXS contract's price significantly influences the prices of other contracts that are traded on DCMs and ECMs.

ICE [48] opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to report trade data to the CFTC." In this regard, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs" rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC, the threshold is not intended to define liquidity in a broader sense. As noted above, the Commission is basing a finding of material liquidity for the ICE HXS contract, in part, on the fact that there have been over 40 trades per day on average in the HXS contract during the second and third quarters of 2009, which is far more than the five trades-per-day that is cited in the ICE comment. In addition, the Commission notes that the number of contracts per transaction in the HXS contract is high (approximately 93 contracts per transaction) and thus, as noted, trading volume (measured in contract units) is substantial. The HXS contract also has significant open interest.

ICE implied that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all [84] months of * * * [the] contract" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a *single* traded month or strip of a given contract." Furthermore, ICE noted that for basis swaps, "about 25–40% of the trades occurred in the single most liquid, usually prompt, month of the contract."

[47] CL 07.

[48] CL 04.

It is the Commission's opinion that liquidity, as it pertains to the HXS contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the HXS contract itself would be considered liquid. ICE's analysis of its own trade data confirms this to be the case for the HXS contract, and thus, the Commission believes that it applied the statistical data cited above in an appropriate manner for gauging material liquidity.

In addition, EI [49] and ICE [50] stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which are cited above includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. Commission staff asked ICE to review the data it sent in its quarterly filings. ICE confirmed that the volume data it provided and which the Commission cited in its October 9, 2009, **Federal Register** notice as well as the additional volume information it cites above includes only transaction data executed on ICE's electronic trading platform.[51] The Commission acknowledges that the open interest information it cites above includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

ii. Conclusion Regarding Material Liquidity

Based on the above, the Commission concludes that the HXS contract meets the material liquidity criterion in that there is sufficient trading activity in the HXS contract to have a material effect on "other agreements, contracts or transactions listed for trading on or subject to the rules of a designated contract market * * * or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act" (that is, an ECM).

[49] CL 05.

[50] CL 04.

[51] Supplemental data supplied by the ICE confirmed that block trades in the third quarter of 2009 were in addition to the trades that were conducted on the electronic platform; block trades comprised 65% of all transactions in the HXS contract.

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the HXS contract performs a significant price discovery function under two of the four criteria established in section 2(h)(7) of the CEA. Although the Commission has concluded that the HXS contract does not meet the price linkage criterion at this time, the Commission has determined that the HXS contract does meet both the material liquidity and material price reference criteria. Accordingly, the Commission is issuing the attached Order declaring that the HXS contract is a SPDC.

Issuance of this Order signals the immediate effectiveness of the Commission's authorities with respect to ICE as a registered entity in connection with its HXS contract,[52] and triggers the obligations, requirements—both procedural and substantive—and timetables prescribed in Commission rule 36.3(c)(4) for ECMs.

V. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA") [53] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA [54] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3)

[52] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[53] 44 U.S.C. 3507(d).

[54] 7 U.S.C. 19(a).

price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act. The Commission has considered the costs and benefits in light of the specific provisions of section 15(a) of the Act and has concluded that the Order, required by Congress to strengthen federal oversight of exempt commercial markets and to prevent market manipulation, is necessary and appropriate to accomplish the purposes of section 2(h)(7) of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order finding that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Section 4(i) of the CEA authorizes the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [55] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect ECMs. The Commission previously has determined that ECMs are not small entities for purposes of the RFA.[56] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Order, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

VI. Order

a. Order Relating to the ICE HSC Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the HSC Financial Basis contract, traded on the IntercontinentalExchange, Inc., satisfies the statutory material liquidity and material price reference criteria for significant price discovery contracts. Consistent with this determination, and effective immediately, the IntercontinentalExchange, Inc., must comply with, with respect to the HSC Financial Basis contract, the nine core principles established by new section 2(h)(7)(C). Additionally, the IntercontinentalExchange, Inc., shall be and is considered a registered entity [57] with respect to the HSC Financial Basis contract and is subject to all the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., commence with the issuance of this Order.[58]

Issued in Washington, DC on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–10341 Filed 5–4–10; 8:45 am]

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[55] 5 U.S.C. 601 *et seq.*

[56] 66 FR 42256, 42268 (Aug. 10, 2001).

[57] 7 U.S.C. 1a(29).

[58] Because ICE already lists for trading a contract (*i.e.,* the Henry Financial LD1 Fixed Price contract) that was previously declared by the Commission to be a SPDC, ICE must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of this Order. 17 CFR 36.3(c)(4).

COMMODITY FUTURES TRADING COMMISSION

Order Finding That the Socal Border Financial Basis Contract Traded on the IntercontinentalExchange, Inc., Performs a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: On October 20, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the Socal Border Financial Basis ("SCL") contract traded on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function pursuant to section 2(h)(7) of the CEA.[2] The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue an order finding that the SCL contract performs a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective date:* April 28, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [3] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—

[1] 74 FR 53723 (October 20, 2009).

[2] 7 U.S.C. 1a(29).

[3] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA. The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily prices of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[5] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[6]

II. Notice of Intent To Undertake SPDC Determination

On October 20, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the SCL contract performs a significant price discovery function and requested comment from interested parties.[7] Comments were received from the Federal Energy Regulatory Commission ("FERC"), Platts and ICE.[8] The comment letters from FERC[9] and Platts did not directly address the issue of whether or not the SCL contract is a SPDC; ICE's comments raised substantive issues with respect to the applicability of section 2(h)(7) to the SCL contract. Generally, ICE asserted that its SCL contract is not a SPDC as it does not meet the material liquidity, material price reference and price linkage criteria for SPDC determination (CL 03). ICE's comments are more extensively discussed below, as applicable.

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.
- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.
- *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[5] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). See also 73 FR 75888, 75894 (Dec. 12, 2008).

[6] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[7] The Commission's Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

[8] FERC is an independent federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. McGraw-Hill, through its division Platts, compiles and calculates monthly natural gas price indices from natural gas trade data submitted to Platts by energy marketers. Platts includes those price indices in its monthly *Inside FERC's Gas Market Report* ("Inside FERC"). ICE is an exempt commercial market, as noted above. The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09-028.html.*

[9] FERC stated that the SCL contract is cash settled and does not contemplate the actual physical delivery of natural gas. Accordingly, FERC expressed the opinion that a determination by the Commission that a contract performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Natural Gas Act (NGA) over certain sales of natural gas in interstate commerce for resale or with its other regulatory responsibilities under the NGA" and further that "FERC staff will continue to monitor for any such conflict * * * [and] advise the CFTC" should any such potential conflict arise. CL 01.

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[10] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[11] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider whether cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract.

IV. Findings and Conclusions

a. The Socal Border Financial Basis (SCL) Contract and the SPDC Indicia

The SCL contract is cash settled based on the difference between the price of natural gas at the Southern California Border hub for the month of delivery, as published in Intelligence Press Inc.'s ("IPI's") *Natural Gas Bidweek Survey,* and the final settlement price for New York Mercantile Exchange's ("NYMEX's") Henry Hub physically-delivered natural gas futures contract for the same specified calendar month. The IPI bidweek price, which is published monthly, is based on a survey of cash market traders who voluntarily report to IPI data on fixed-price transactions for physical delivery of natural gas at the Socal Border hub conducted during the last five business days of the month; such bidweek transactions specify the delivery of natural gas on a uniform basis throughout the following calendar month at the agreed upon rate. The IPI bidweek index is published on the first business day of the calendar month in which the natural gas is to be delivered. The size of the SCL contract is 2,500 million British thermal units ("mmBtu"), and the unit of trading is any multiple of 2,500 mmBtu. The SCL contract is listed for up to 120 calendar months commencing with the next calendar month.

The Henry Hub,[12] which is located in Erath, Louisiana, is the primary cash market trading and distribution center for natural gas in the United States. It also is the delivery point and pricing basis for the NYMEX's actively traded, physically-delivered natural gas futures contract, which is the most important pricing reference for natural gas in the United States. The Henry Hub, which is operated by Sabine Pipe Line, LLC, serves as a juncture for 13 different pipelines. These pipelines bring in natural gas from fields in the Gulf Coast region and ship it to major consumption centers along the East Coast and Midwest. The throughput shipping capacity of the Henry Hub is 1.8 trillion mmBtu per day.

In addition to the Henry Hub, there are a number of other locations where natural gas is traded. In 2008, there were 33 natural gas market centers in North America.[13] Some of the major trading centers include Alberta, Northwest Rockies, Socal and the Houston Ship Channel. For locations that are directly connected to the Henry Hub by one or more pipelines and where there typically is adequate shipping capacity, the price at the other locations usually directly tracks the price at the Henry Hub, adjusted for transportation costs. However, at other locations that are not directly connected to the Henry Hub or where shipping capacity is limited, the prices at those locations often diverge from the Henry Hub price. Furthermore, one local price may be significantly different than the price at another location even though the two markets' respective distances from the Henry Hub are the same. The reason for such pricing disparities is that a given location may experience supply and demand factors that are specific to that region, such as differences in pipeline shipping capacity, unusually high or low demand for heating or cooling or supply disruptions caused by severe weather. As a consequence, local natural gas prices can differ from the Henry Hub price by more than the cost of shipping and such price differences can vary in an unpredictable manner.

The Socal Border hub is located in Southern California on the border with Arizona.[14] The California Energy Hub, a market center that includes the Socal Border Hub, had an estimated throughput capacity of 900 million cubic feet per day. Moreover, the number of pipeline interconnections at the California Energy Hub was 12 in 2008, up from five in 2003. Lastly, the pipeline interconnection capacity of the California Energy Hub in 2008 was 6,784 million cubic feet per day, which constituted a 47 percent increase over the pipeline interconnection capacity in 2003.[15] The Socal Border hub is far removed from the Henry Hub and is not directly connected to the Henry Hub by an existing pipeline.

For all these reasons, the local price at the Socal hub typically differs from the price at the Henry Hub. Thus, the price of the Henry Hub physically-delivered futures contract is an imperfect proxy for the Socal Border price. Moreover, exogenous factors, such as adverse weather, can cause the Socal gas price to differ from the Henry Hub price by an amount that is more or less than the cost of shipping, making the NYMEX Henry Hub futures contract even less precise as a hedging tool than desired by market participants. Basis contracts[16] allow traders to more accurately discover prices at alternative locations and hedge price risk that is associated with natural gas at such locations.[17] In this regard, a position at

[10] In its October 20, 2009, **Federal Register** release, the Commission identified material liquidity, material price reference and price linkage as the possible criteria for SPDC determination of the SCL contract. Arbitrage was not identified as a possible criterion and will not be discussed further in this document or the associated Order.

[11] 17 CFR part 36, Appendix A.

[12] The term "hub" refers to a juncture where two or more natural gas pipelines are connected. Hubs also serve as pricing points for natural gas at the particular locations.

[13] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[14] The Socal Border hub typically includes fixed-price gas delivered into Southern California Gas Co.'s pipeline system from El Paso Corp.'s pipeline at Topock and Blythe, CA/Ehrenberg, AZ; from Kern River Gas Transmission Co.'s pipeline at Wheeler Ridge and Kramer Junction, CA; and from Questar Pipeline Co.'s Southern Trail Pipeline at Needles, CA. The Socal price index includes deliveries from Pacific Gas and Electric at several points, including the Kern River station and Pisgah/Daggett, as well as in-state production.

[15] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[16] Basis contracts denote the difference in the price of natural gas at a specified location minus the price of natural gas at the Henry Hub. The differential can be either a positive or negative value.

[17] Commercial activity in natural gas basis swap contracts is evidenced by large positions held by energy trading firms in the comparable NYMEX ClearPort basis swap contract for the Socal hub.

a local price for an alternative location can be established by adding the appropriate basis swap position to a position taken in the NYMEX physically-delivered Henry Hub contract (or in the NYMEX or ICE Henry Hub look-alike contract, which cash settle based on the NYMEX physically-delivered natural gas contract's final settlement price).

In its October 20, 2009, **Federal Register** notice, the Commission identified material liquidity, price linkage and material price reference as the potential SPDC criteria applicable to the SCL contract. Each of these criteria is discussed below.[18]

1. Material Price Reference Criterion

The Commission's October 20, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission considered the fact that ICE maintains exclusive rights over IPI's bidweek price indices. As a result, no other exchange can offer such a basis contract based on IPI's Socal bidweek index. While other third-party price providers produce natural gas price indices for this and other trading centers, market participants indicate that the IPI Socal bidweek index is highly regarded for this particular location and should market participants wish to establish a hedged position based on this index, they would need to do so by taking a position in the ICE SCL swap since ICE has the right to the IPI index for cash settlement purposes. In addition, ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "West Gas End of Day" and "OTC Gas End of Day"[19] packages with access to all price data or just current prices plus a selected number of months (i.e., 12, 24, 36 or 48 months) of historical data. These two packages include price data for the SCL contract.

The Socal Border hub is a major trading center for natural gas in the United States. Traders, including producers, keep abreast of the prices of the SCL contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of natural gas at the Socal Border when entering into cash market transactions for natural gas, especially those trades providing for physical delivery in the future. Traders use the ICE SCL contract, as well as other ICE basis swap contracts, to hedge cash market positions and transactions—activities which enhance the SCL contract's price discovery utility. The substantial volume of trading and open interest in the SCL contract appears to attest to its use for this purpose. While the SCL contract's settlement prices may not be the only factor influencing spot and forward transactions, natural gas traders consider the ICE price to be a critical factor in conducting OTC transactions.[20]

NYMEX lists a futures contract that is comparable to the ICE SCL contract on its ClearPort platform. However, unlike the ICE contract, none of the trades in the NYMEX SoCal Basis Swap are executed in NYMEX's centralized marketplace; instead, all of the transactions originate as bilateral swaps that are submitted to NYMEX for clearing. The daily settlement prices of the NYMEX SoCal Basis Swap contract are influenced, in part, by the daily settlement prices of the ICE SCL contract. This is because NYMEX determines the daily settlement prices for its natural gas basis swap contracts through a survey of cash market voice brokers. Voice brokers, in turn, refer to the ICE SCL price, among other information, as an important indicator as to where the market is trading. Therefore, the ICE SCL price influences the settlement price for the NYMEX SoCal Basis Swap contract. This is supported by an analysis of the daily settlement prices for the NYMEX and ICE Socal basis swap contracts. In this regard, 99 percent of the daily settlement prices for the NYMEX SoCal Basis Swap contract are within one standard deviation of the SCL contract's settlement prices.

Lastly, the fact that the SCL contract does not meet the price linkage criterion (discussed below) bolsters the argument for material price reference. As noted above, the Henry Hub is the pricing reference for natural gas in the United States. However, regional market conditions may cause the price of natural gas in another area of the country to diverge by more than the cost of transportation, thus making the Henry Hub price an imperfect proxy for the local gas price. The more variable the local natural gas price is, the more traders need to accurately hedge their price risk. Basis swap contracts provide a means of more accurately pricing natural gas at a location other than the Henry Hub. An analysis of Socal natural gas prices showed that 93 percent of the observations were more than 2.5 percent different that the contemporaneous Henry Hub prices. Specifically, the average Socal basis value between January 2008 and September 2009 was −$0.78 per mmBtu with a variance of $0.29 per mmBtu.

i. **Federal Register** Comments

As noted above, ICE was the sole respondent which addressed the question of whether the SCL contract is a SPDC. ICE stated in its comment letter that the SCL contract does not meet the material price reference criterion for SPDC determination. ICE argued that the Commission appeared to base the case that the SCL contract is potentially a SPDC on two disputable assertions. First, in issuing its notice of intent to determine whether the SCL contract is a SPDC, the CFTC cited a general conclusion in its ECM study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts." ICE states that, "Basing a material price reference determination on general statements made in a two year old study does not seem to meet Congress' intent that the CFTC use its considerable expertise to study the OTC markets." In response to the above comment, the Commission notes that it cited the ECM study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets merely as an indicia that an investigation of certain ICE contracts may be warranted, and was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

Second, ICE argued that the Commission should not base a determination that the SCL contract is a SPDC merely because this contract has the exclusive right to base its settlement on the IPI Socal Border Index price. While the Commission acknowledges that there are other firms that produce price indices for the Socal hub, as it notes above, market participants indicate that the IPI Index is very highly regarded and should they wish to establish a hedged position based on this index, they would need to do so by taking a position in the ICE SCL swap

[18] As noted above, the Commission did not find an indication of arbitrage in connection with this contract; accordingly, that criterion was not discussed in reference to the SCL contract.

[19] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

[20] In addition to referencing ICE prices, natural gas market firms participating in the Socal market may rely on other cash market quotes as well as industry publications and price indices that are published by third-party price reporting firms in entering into natural gas transactions.

since ICE has the exclusive right to use the IPI index.[21]

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the SCL contract meets the material price reference criterion because it is referenced and consulted on a frequent and recurring basis by cash market participants when pricing transactions (direct evidence). Moreover, the ECM sells the SCL contract's price data to market participants (indirect evidence).

2. Price Linkage Criterion

In its October 20, 2009, **Federal Register** notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the SCL contract. In this regard, the final settlement of the SCL contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas futures contract, where the NYMEX is registered with the Commission as a DCM.

The Commission's Guidance on Significant Price Discovery Contracts [22] notes that a "price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract." Furthermore, the Guidance notes that, "[f]or a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract. The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract." Furthermore, the Guidance proposes a threshold price relationship such that prices of the ECM linked contract will fall within a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement or other daily prices over the most recent quarter. Finally, the Commission also stated in the Guidance that it would consider a linked contract that has a trading volume equivalent to 5 percent of the volume of trading in the contract to which it is linked to have sufficient volume potentially to be deemed a SPDC ("minimum threshold").

To assess whether the SCL contract meets the price linkage criterion, Commission staff obtained price data from ICE and performed the statistical tests cited above. Staff found that, while the Socal Border price is determined, in part, by the final settlement price of the NYMEX physically-delivered natural gas futures contract (a DCM contract), the Socal hub price is not within 2.5 percent of the settlement price of the corresponding NYMEX Henry Hub natural gas futures contract on 95 percent or more of the days. Specifically, during the third quarter of 2009, only 7 percent of the Socal Border natural gas prices derived from the ICE basis values were within 2.5 percent of the daily settlement price of the NYMEX Henry Hub futures contract. In addition, staff found that the SCL contract fails to meet the volume threshold requirement. In particular, the total trading volume in the NYMEX physically-delivered natural gas contract during the third quarter of 2009 was 14,022,963 contracts, with 5 percent of that number being 701,148 contracts. The number of trades on the ICE centralized market in the SCL contract during the same period was 507,870 contracts (equivalent to 126,967 NYMEX contracts, given the size difference).[23] Thus, centralized-market trades in the SCL contract amounted to less than the minimum threshold.

Due to the specific criteria that a given ECM contract must meet to fulfill the price linkage criterion, the requirements, for all intents and purposes, exclude ECM contracts that are not near facsimiles of DCM contracts even though the ECM contract may specifically use the settlement price to value a position, which is the case of the SCL contract. In this regard, an ECM contract that is priced and traded as if it is a functional equivalent of a DCM contract likely will have a price series that mirrors that of the corresponding DCM contract. In contrast, for contracts that are not look-alikes of DCM contracts, it is reasonable to expect that the two price series would be divergent. The Socal Border hub and the Henry Hub are located in two different areas of the United States. Moreover, the Henry Hub is primarily a supply center while Southern California is a demand center. These differences contribute to the divergence between the two price series and, as discussed below, increase the likelihood that the "basis" contract is used for material price reference.

i. **Federal Register** Comments

As noted above, ICE was the sole respondent which addressed the question of whether the SCL contract is a SPDC. ICE stated in its comment letter that the SCL contract does not meet the price linkage criterion for SPDC determination because it fails the volume test provided in the Commission's Guidance.

ii. Conclusion Regarding the Price Linkage Criterion

Based on the above, the Commission finds that the SCL contract does not meet the price linkage criterion because it fails the price relationship and volume tests provided for in the Commission's Guidance.

3. Material Liquidity Criterion

To assess whether the SCL contract meets the material liquidity criterion, the Commission first examined volume and open interest data provided to it by ICE as a general measurement of the SCL market's size and potential importance, and second performed a statistical analysis to measure the effect that changes to SCL prices potentially may have on prices for the NYMEX Henry Hub Natural Gas (a DCM contract), the ICE AECO Financial Basis contract (an ECM contract) and the HSC [24] Financial Basis contract (an ECM contract).[25]

The Commission's Guidance (Appendix A to Part 36) notes that "[t]raditionally, objective measures of trading such as volume or open interest have been used as measures of liquidity." In this regard, the Commission in its October 20, 2009, **Federal Register** notice referred to second quarter 2009 trading statistics that ICE had submitted for its SCL contract. Based upon on a required quarterly filing made by ICE on July 27, 2009, the total number of SCL trades

[21] Futures and swaps based on other Socal indices have not met with the same market acceptance as the SCL contract. For example, NYMEX lists a basis swap contract that is comparable to the SCL contract with the exception that it uses a different price index for cash settlement. Open interest as of September 30, 2009, was approximately 75,000 contracts in the NYMEX SoCal Basis Swap contract versus nearly 400,000 contracts in ICE's SCL contract. Moreover, there has been no centralized-market trading in the NYMEX Socal Basis Swap contract, so that contract does not serve as a source of price discovery for cash market traders with natural gas at that location.

[22] Appendix A to the Part 36 rules.

[23] The SCL contract is one-quarter the size of the NYMEX Henry Hub physically-delivered futures contract.

[24] The acronym stands for Houston Ship Channel.

[25] As noted above, the material liquidity criterion speaks to the effect that transactions in the potential SPDC may have on trading in "agreements, contracts and transactions listed for trading on or subject to the rules of a designated contract market, a derivatives transaction execution facility, or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act."

executed on ICE's electronic trading platform was 8,102 in the second quarter of 2009, resulting in a daily average of 126.6 trades. During the same period, the SCL contract had a total trading volume on ICE's electronic trading platform of 612,452 contracts and an average daily trading volume of 9,569 contracts. Moreover, the open interest as of June 30, 2009, was 417,121 contracts, which included trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.[26]

Subsequent to the October 20, 2009, **Federal Register** notice, ICE submitted another quarterly notification filed on November 13, 2009,[27] with updated trading statistics. Specifically, with respect to its SCL contract, 7,080 separate trades occurred on its electronic platform in the third quarter of 2009, resulting in a daily average of 107.3 trades. During the same period, the SCL contract had a total trading volume on its electronic platform of 507,870 contracts (which was an average of 7,695 contracts per day).[28] As of September 30, 2009, open interest in the SCL contract was 398,875 contracts.[29] Reported open interest included positions resulting from trades that were executed on ICE's electronic platform, as well as trades that were executed off of ICE's electronic platform and brought to ICE for clearing.

In Appendix A to Part 36, the material liquidity criterion for SPDC determination specifies that an ECM contract should have a material effect on another contract. To measure the effect that the SCL contract potentially could have on a DCM contract, or on another ECM contract, Commission staff performed a statistical analysis[30] using daily settlement prices (between January 2, 2008, and September 30, 2009) for the NYMEX Henry Hub natural gas contract (a DCM contract) and price levels for the Alberta, Houston Ship Channel ("HSC"), and Socal market centers.[31] The simulation results suggest that, on average over the sample period, a one percent rise in the Socal natural gas price elicited a 0.8 percent increase in each of the Alberta, HSC, and NYMEX Henry Hub prices.

i. **Federal Register** Comments

As noted above, ICE was the sole respondent which addressed the question of whether the SCL contract is a SPDC. ICE stated in its comment letter that the SCL contract does not meet the material liquidity criterion for SPDC determination for a number of reasons.

First, ICE opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to report trade data to the CFTC." In this regard, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs"[32] rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC; the threshold is not intended to define liquidity in a broader sense. As noted above, the Commission is basing a finding of material liquidity for the ICE SCL contract, in part, on the fact that there were over 100 trades per day on average in the SCL contract during the last two reporting quarters of 2009, which was far more than the five trades-per-day threshold that is cited in the ICE comment. In addition, the Commission notes that the number of contracts per transaction in the SCL contract is high (approximately 72 contracts per transaction) and thus, as noted, trading volume (measured in contract units) is substantial. The SCL contract also has substantial open interest.

ICE also stated that "the statistics [provided by ICE] have been misinterpreted and misapplied." In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in all 120 months of each contract" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a single traded month or strip of a given contract." Furthermore, ICE noted that for the SCL contract, "about 29% of the trades occurred in the single most liquid, usually prompt, month of the contract."

It is the Commission's opinion that liquidity, as it pertains to the SCL contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the SCL contract itself would be considered liquid. ICE's analysis of its own trade data confirms this to be the case for the SCL contract, and thus, the Commission believes that it applied the statistical data cited above in an appropriate manner for gauging material liquidity.

In addition, ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which are cited above includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. The Commission staff asked ICE to review the data it sent in its quarterly filings. In response, ICE confirmed that the volume data it provided and which the Commission cited in its October 20, 2009, **Federal Register** notice, as well as the additional volume information it cites above, includes only transaction data executed on ICE's electronic trading platform.[33] The Commission acknowledges that the open interest information it cites above includes transactions made off the ICE platform. However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any

[26] ICE does not differentiate between open interest created by a transaction executed on its trading platform versus that created by a transaction executed off its trading platform. 74 FR 53723 (October 20, 2009).

[27] See Commission Rule 36.3(c)(2), 17 CFR 36.3(c)(2).

[28] By way of comparison, the number of contracts traded in the SCL contract is similar to that exhibited on a liquid futures market and is roughly equivalent to the volume of trading for the ICE Futures U.S. Cotton No. 2 futures contract during this period.

[29] By way of comparison, open interest in the SCL contract is roughly equivalent to that in the Chicago Board of Trade's soybean contract and the Commodity Exchange's Gold futures contract.

[30] Specifically, the Commission econometrically estimated a vector autoregression model using daily natural gas price levels. A vector autoregression model is an econometric model used to capture the dependencies and interrelationships among multiple time series, generalizing the univariate autoregression model. The estimated model displays strong diagnostic evidence of statistical adequacy. In particular, the model's impulse response function was shocked with a one-time rise in Socal price. The simulation results suggest that, on average over the sample period, a one percent rise in the Socal natural gas price elicited a 0.8 percent increase in the NYMEX Henry Hub price, as well as a 0.8 percent increase in each of the other two modeled natural gas prices. These multipliers of response emerge with noticeable statistical strength or significance. Based on such long run sample patterns, if the Socal price rises by 10 percent, then the price of NYMEX Henry Hub natural gas futures contract, as well as those for the Alberta and HSC hubs, each would rise by about 8 percent.

[31] Natural gas prices at the Alberta, HSC, and Socal trading centers were obtained by adding the daily settlement prices of ICE's AECO Financial Basis, HSC Financial Basis and Socal Border Financial Basis contracts, respectively, to the contemporaneous daily settlement prices of the NYMEX Henry Hub physically-delivered natural gas futures contract.

[32] 73 FR 75892 (December 12, 2008).

[33] Supplemental data supplied by ICE confirmed that block trades in the third quarter of 2009 were in addition to the trades that were conducted on the electronic platform; block trades comprised 45.7 percent of all transactions in the SCL contract.

way agreeable to the position holder regardless of how the position was initially created.

ii. Conclusion Regarding Material Liquidity

Based on the above, the Commission concludes that the SCL contract meets the material liquidity criterion in that there is sufficient trading activity in the SCL contract to have a material effect on "other agreements, contracts or transactions listed for trading on or subject to the rules of a designated contract market * * * or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act" (that is, an ECM).

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the SCL contract performs a significant price discovery function under two of the four criteria established in section 2(h)(7) of the CEA. Although the Commission has determined that the SCL contract does not meet the price linkage criterion at this time, the Commission has determined that the SCL contract does meet both the material liquidity and material price reference criteria. Accordingly, the Commission will issue the attached Order declaring that the SCL contract is a SPDC.

Issuance of this Order signals the immediate effectiveness of the Commission's authorities with respect to ICE as a registered entity in connection with its SCL contract,[34] and triggers the obligations, requirements—both procedural and substantive—and timetables prescribed in Commission rule 36.3(c)(4) for ECMs.

V. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA") [35] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA. Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA [36] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act. The Commission has considered the costs and benefits in light of the specific provisions of section 15(a) of the Act and has concluded that the Order, required by Congress to strengthen federal oversight of exempt commercial markets and to prevent market manipulation, is necessary and appropriate to accomplish the purposes of section 2(h)(7) of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order finding that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Section 4(i) of the CEA authorizes the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [37] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect ECMs. The Commission previously has determined that ECMs are not small entities for purposes of the RFA.[38] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Order, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

VI. Order

a. Order Relating to the ICE Socal Border Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Socal Border Financial Basis contract, traded on the IntercontinentalExchange, Inc., satisfies the statutory material liquidity and material price reference criteria for significant price discovery contracts. Consistent with this determination, and effective immediately, the IntercontinentalExchange, Inc., must comply with, with respect to the ICE Socal Border Financial Basis contract, the nine core principles established by new section 2(h)(7)(C). Additionally, the IntercontinentalExchange, Inc., shall be and is considered a registered entity [39] with respect to the Socal Border Financial Basis contract and is subject to all the provisions of the Commodity Exchange Act applicable to registered entities.

Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing

[34] *See* 73 FR 75888, 75893 (Dec. 12, 2008).

[35] 44 U.S.C. 3507(d).

[36] 7 U.S.C. 19(a).

[37] 5 U.S.C. 601 *et seq.*

[38] 66 FR 42256, 42268 (Aug. 10, 2001).

[39] 7 U.S.C. 1a(29).

core principle compliance by the IntercontinentalExchange, Inc., commence with the issuance of this Order.[40]

Issued in Washington, DC, on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–10335 Filed 5–4–10; 8:45 am]

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COMMODITY FUTURES TRADING COMMISSION

Order Finding That the ICE Waha Financial Basis Contract Traded on the IntercontinentalExchange, Inc., Performs a Significant Price Discovery Function

AGENCY: Commodity Futures Trading Commission.

ACTION: Final order.

SUMMARY: On October 9, 2009, the Commodity Futures Trading Commission ("CFTC" or "Commission") published for comment in the **Federal Register** [1] a notice of its intent to undertake a determination whether the Waha Financial Basis ("WAH") contract, traded on the IntercontinentalExchange, Inc. ("ICE"), an exempt commercial market ("ECM") under sections 2(h)(3)–(5) of the Commodity Exchange Act ("CEA" or the "Act"), performs a significant price discovery function pursuant to section 2(h)(7) of the CEA. The Commission undertook this review based upon an initial evaluation of information and data provided by ICE as well as other available information. The Commission has reviewed the entire record in this matter, including all comments received, and has determined to issue an order finding that the WAH contract performs a significant price discovery function. Authority for this action is found in section 2(h)(7) of the CEA and Commission rule 36.3(c) promulgated thereunder.

DATES: *Effective Date:* April 28, 2010.

FOR FURTHER INFORMATION CONTACT: Gregory K. Price, Industry Economist, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Telephone: (202) 418–5515. E-mail: *gprice@cftc.gov;* or Susan Nathan, Senior Special Counsel, Division of Market Oversight, same address. Telephone: (202) 418–5133. E-mail: *snathan@cftc.gov*.

SUPPLEMENTARY INFORMATION:

I. Introduction

The CFTC Reauthorization Act of 2008 ("Reauthorization Act") [2] significantly broadened the CFTC's regulatory authority with respect to ECMs by creating, in section 2(h)(7) of the CEA, a new regulatory category—ECMs on which significant price discovery contracts ("SPDCs") are traded—and treating ECMs in that category as registered entities under the CEA.[3] The legislation authorizes the CFTC to designate an agreement, contract or transaction as a SPDC if the Commission determines, under criteria established in section 2(h)(7), that it performs a significant price discovery function. When the Commission makes such a determination, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the Act and Commission regulations, and must comply with nine core principles established by new section 2(h)(7)(C).

On March 16, 2009, the CFTC promulgated final rules implementing the provisions of the Reauthorization Act.[4] As relevant here, rule 36.3 imposes increased information reporting requirements on ECMs to assist the Commission in making prompt assessments whether particular ECM contracts may be SPDCs. In addition to filing quarterly reports of its contracts, an ECM must notify the Commission promptly concerning any contract traded in reliance on the exemption in section 2(h)(3) of the CEA that averaged five trades per day or more over the most recent calendar quarter, and for which the exchange sells its price information regarding the contract to market participants or industry publications, or whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily prices of another contract.

Commission rule 36.3(c)(3) established the procedures by which the Commission makes and announces its determination whether a particular ECM contract serves a significant price discovery function. Under those procedures, the Commission will publish notice in the **Federal Register** that it intends to undertake an evaluation whether the specified agreement, contract or transaction performs a significant price discovery function and to receive written views, data and arguments relevant to its determination from the ECM and other interested persons. Upon the close of the comment period, the Commission will consider, among other things, all relevant information regarding the subject contract and issue an order announcing and explaining its determination whether or not the contract is a SPDC. The issuance of an affirmative order signals the effectiveness of the Commission's regulatory authorities over an ECM with respect to a SPDC; at that time such an ECM becomes subject to all provisions of the CEA applicable to registered entities.[5] The issuance of such an order also triggers the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4).[6]

II. Notice of Intent to Undertake SPDC Determination

On October 9, 2009, the Commission published in the **Federal Register** notice of its intent to undertake a determination whether the WAH contract performs a significant price discovery function, and requested comment from interested parties.[7] Comments were received from the Industrial Energy Consumers of America ("IECA"), Working Group of Commercial Energy Firms ("WGCEF"), ICE, Platts, Economists Incorporated ("EI"), Federal Energy Regulatory Commission ("FERC"), and Financial Institutions

[40] Because ICE already lists for trading a contract (i.e., the Henry Financial LD1 Fixed Price contract) that was previously declared by the Commission to be a SPDC, ICE must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of this Order. 17 CFR 36.3(c)(4).

[1] 74 FR 52202 (October 9, 2009).

[2] Incorporated as Title XIII of the Food, Conservation and Energy Act of 2008, Public Law 110–246, 122 Stat. 1624 (June 18, 2008).

[3] 7 U.S.C. 1a(29).

[4] 74 FR 12178 (Mar. 23, 2009); these rules became effective on April 22, 2009.

[5] Public Law 110–246 at 13203; *Joint Explanatory Statement of the Committee of Conference,* H.R. Rep. No. 110–627, 110 Cong., 2d Sess. 978, 986 (Conference Committee Report). *See also* 73 FR 75888, 75894 (Dec. 12, 2008).

[6] For an initial SPDC, ECMs have a grace period of 90 calendar days from the issuance of a SPDC determination order to submit a written demonstration of compliance with the applicable core principles. For subsequent SPDCs, ECMs have a grace period of 30 calendar days to demonstrate core principle compliance.

[7] The Commission's Part 36 rules establish, among other things, procedures by which the Commission makes and announces its determination whether a specific ECM contract serves a significant price discovery function. Under those procedures, the Commission publishes a notice in the **Federal Register** that it intends to undertake a determination whether a specified agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the ECM and other interested persons.

Energy Group ("FIEG").[8] The comment letters from FERC[9] and Platts did not directly address the issue of whether or not the WAH contract is a SPDC; IECA concluded that the WAH contract is a SPDC, but did not provide a basis for its conclusion.[10] The other parties' comments raised substantive issues with respect to the applicability of section 2(h)(7) to the WAH contract, generally asserting that the WAH contract is not a SPDC as it does not meet the material price reference, price linkage, and material liquidity criteria for SPDC determination. Those comments are more extensively discussed below, as applicable.

III. Section 2(h)(7) of the CEA

The Commission is directed by section 2(h)(7) of the CEA to consider the following criteria in determining a contract's significant price discovery function:

- *Price Linkage*—the extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market ("DCM") or derivatives transaction execution facility ("DTEF"), or a SPDC traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position.
- *Arbitrage*—the extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a DCM or DTEF, or a SPDC traded on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis.
- *Material price reference*—the extent to which, on a frequent and recurring basis, bids, offers or transactions in a commodity are directly based on, or are determined by referencing or consulting, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility.
- *Material liquidity*—the extent to which the volume of agreements, contracts or transactions in a commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a DCM, DTEF or electronic trading facility operating in reliance on the exemption in section 2(h)(3).

Not all criteria must be present to support a determination that a particular contract performs a significant price discovery function, and one or more criteria may be inapplicable to a particular contract.[11] Moreover, the statutory language neither prioritizes the criteria nor specifies the degree to which a SPDC must conform to the various criteria. In Guidance issued in connection with the Part 36 rules governing ECMs with SPDCs, the Commission observed that these criteria do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, the Commission has indicated that in making its determinations it will consider the circumstances under which the presence of a particular criterion, or combination of criteria, would be sufficient to support a SPDC determination.[12] For example, for contracts that are linked to other contracts or that may be arbitraged with other contracts, the Commission will consider whether the price of the potential SPDC moves in such harmony with the other contract that the two markets essentially become interchangeable. This co-movement of prices would be an indication that activity in the contract had reached a level sufficient for the contract to perform a significant price discovery function. In evaluating a contract's price discovery role as a price reference, the Commission will consider the extent to which, on a frequent and recurring basis, bids, offers or transactions are directly based on, or are determined by referencing, the prices established for the contract.

IV. Findings and Conclusions

a. The Waha Financial Basis (WAH) Contract and the SPDC Indicia

The WAH contract is cash settled based on the difference between the bidweek price index of natural gas at the Waha hub in western Texas for the month of delivery, as published in Platts' *Inside FERC's Gas Market Report,* and the final settlement price of the New York Mercantile Exchange's ("NYMEX's") physically-delivered Henry Hub natural gas futures contract for the same calendar month. The Platts bidweek price, which is published monthly, is based on a survey of cash market traders who voluntarily report to Platts data on fixed-price transactions for physical delivery of natural gas at the Waha hub conducted during the last five business days of the month; such bidweek transactions specify the delivery of natural gas on a uniform basis throughout the following calendar month at the agreed upon rate. Platts' current policy is to use physical deals into interstate and intrastate pipelines at the outlet of the Waha header system and in the Waha vicinity in the Permian Basin in West Texas. Pipelines include El Paso Natural Gas, Transwestern Pipeline, Natural Gas Pipeline Co. of America, Northern Natural Gas, Delhi Pipeline, Oasis Pipeline, EPGT Texas and Lone Star Pipeline. The Platt's

[8] IECA describes itself as an "association of leading manufacturing companies" whose membership "represents a diverse set of industries including: Plastics, cement, paper, food processing, brick, chemicals, fertilizer, insulation, steel, glass, industrial gases, pharmaceutical, aluminum and brewing." WGCEF describes itself as "a diverse group of commercial firms in the domestic energy industry whose primary business activity is the physical delivery of one or more energy commodities to customers, including industrial, commercial and residential consumers" and whose membership consists of "energy producers, marketers and utilities." ICE is an ECM, as noted above. McGraw-Hill, through its division Platts, compiles and calculates monthly natural gas price indices from natural gas trade data submitted to Platts by energy marketers. Platts includes those price indices in its monthly *Inside FERC's Gas Market Report* ("Inside FERC"). EI is an economic consulting firm with offices located in Washington, DC, and San Francisco, CA. NGSA is an industry association comprised of natural gas producers and marketers. FERC is an independent Federal regulatory agency that, among other things, regulates the interstate transmission of natural gas, oil and electricity. FIEG describes itself as an association of investment and commercial banks who are active participants in various sectors of the natural gas markets, "including acting as marketers, lenders, underwriters of debt and equity securities, and proprietary investors." The comment letters are available on the Commission's Web site: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2009/09-025.html.*

[9] FERC stated that the WAH contract is cash settled and does not contemplate actual physical delivery of natural gas. Accordingly, FERC expressed the opinion that a determination by the Commission that a contract performs a significant price discovery function "would not appear to conflict with FERC's exclusive jurisdiction under the Natural Gas Act (NGA) over certain sales of natural gas in interstate commerce for resale or with its other regulatory responsibilities under the NGA" and further that, "the FERC staff will continue to monitor for any such conflict * * * [and] advise the CFTC" should any such potential conflict arise. CL 07.

[10] IECA stated that the subject ICE contract should "be required to come into compliance with core principles mandated by Section 2(h)(7) of the Act and with other statutory provisions applicable to registered entities. [This contract] should be subject to the Commission's position limit authority, emergency authority and large trader reporting requirements, among others." CL 01.

[11] In its October 9, 2009, **Federal Register** release, the Commission identified material liquidity, material price reference and price linkage as the possible criteria for SPDC determination of the WAH contract. Arbitrage was not identified as a possible criterion and will not be discussed further in this document or the associated Order.

[12] 17 CFR part 36, Appendix A.

bidweek index is published on the first business day of the calendar month in which the natural gas is to be delivered. The size of the WAH contract is 2,500 million British thermal units ("mmBtu"), and the unit of trading is any multiple of 2,500 mmBtu. The WAH contract is listed for up to 72 calendar months commencing with the next calendar month.

The Henry Hub,[13] which is located in Erath, Louisiana, is the primary cash market trading and distribution center for natural gas in the United States. It also is the delivery point and pricing basis for the NYMEX's actively traded, physically-delivered natural gas futures contract, which is the most important pricing reference for natural gas in the United States. The Henry Hub, which is operated by Sabine Pipe Line, LLC, serves as a juncture for 13 different pipelines. These pipelines bring in natural gas from fields in the Gulf Coast region and ship it to major consumption centers along the East Coast and Midwest. The throughput shipping capacity of the Henry Hub is 1.8 trillion mmBtu per day.

In addition to the Henry Hub, there are a number of other locations where natural gas is traded. In 2008, there were 33 natural gas market centers in North America.[14] Some of the major trading centers include Alberta, Northwest Rockies, Southern California border and the Houston Ship Channel. For locations that are directly connected to the Henry Hub by one or more pipelines and where there typically is adequate shipping capacity, the price at the other locations usually directly tracks the price at the Henry Hub, adjusted for transportation costs. However, at other locations that are not directly connected to the Henry Hub or where shipping capacity is limited, the prices at those locations often diverge from the Henry Hub price. Furthermore, one local price may be significantly different than the price at another location even though the two markets' respective distances from the Henry Hub are the same. The reason for such pricing disparities is that a given location may experience supply and demand factors that are specific to that region, such as differences in pipeline shipping capacity, unusually high or low demand for heating or cooling or supply disruptions caused by severe weather. As a consequence, local natural gas prices can differ from the Henry Hub price by more than the cost of shipping and such price differences can vary in an unpredictable manner.

The Waha hub lies south of the prolific gas deposits in the San Juan and Permian Basins of West Texas, near the New Mexico border. The hub is accessible by several interstate and intrastate pipelines that serve customer bases in both the Western and Midwestern United States. As noted above, the cash market transactions included in the Platts index are those fixed-price gas deliveries into the following pipelines: El Paso Natural Gas, Transwestern Pipeline, Natural Gas Pipeline Company of America, Northern Natural Gas, Delhi Pipeline, Oasis Pipeline, EPGT Texas and Lone Star Pipeline. While the Waha pricing center does not appear to be far removed from the Henry Hub, the gas from Waha tends to flow to the Western and Midwest whereas the gas from the Henry Hub tends to flow East of the Mississippi.

The Waha (EPGT) and Waha (CDP/Atmos) Texas Hubs, two market centers near the Waha Hub, had an estimated throughput capacity in 2008 of 250 million cubic feet per day and 300 million cubic feet per day, respectively. Moreover, the number of pipeline interconnections at each market center was 10 in 2008. Lastly, the pipeline interconnection capacity of the Waha (EPGT) and Waha (CDP/Atmos) Texas Hubs in 2008 were 1.8 billion million cubic feet per day and 2.3 billion cubic feet per day, respectively.[15] The Waha hub is removed from the Henry Hub and is not directly connected to the Henry Hub by an existing pipeline.

The local price at the Waha hub typically differs from the price at the Henry Hub. Thus, the price of the Henry Hub physically-delivered futures contract is an imperfect proxy for the WAH contract's price. Moreover, the Waha hub is landlocked and so is less susceptible to exogenous factors such as extreme weather, which can cause the Waha gas price to differ from the Henry Hub price by an amount that is more or less than the cost of shipping, making the NYMEX Henry Hub futures contract even less precise as a hedging tool than desired by market participants. Basis contracts[16] allow traders to more accurately discover prices at alternative locations and hedge price risk that is associated with natural gas at such locations. In this regard, a position at a local price for an alternative location can be established by adding the appropriate basis swap position to a position taken in the NYMEX physically-delivered Henry Hub contract (or in the NYMEX or ICE Henry Hub look-alike contract, which cash settle based on the NYMEX physically-delivered natural gas contract's final settlement price).

In its October 9, 2009, **Federal Register** notice, the Commission identified material price reference, price linkage and material liquidity as the potential SPDC criteria applicable to the WAH contract. Each of these criteria is discussed below.[17]

1. Material Price Reference Criterion

The Commission's October 9, 2009, **Federal Register** notice identified material price reference as a potential basis for a SPDC determination with respect to this contract. The Commission considered the fact that ICE sells its price data to market participants in a number of different packages which vary in terms of the hubs covered, time periods, and whether the data are daily only or historical. For example, ICE offers the "OTC Gas End of Day"[18] package with access to all price data or just current prices plus a selected number of months (*i.e.,* 12, 24, 36 or 48 months) of historical data. These two packages include price data for the WAH contract.

The Commission also noted that its October 2007 *Report on the Oversight of Trading on Regulated Futures Exchanges and Exempt Commercial Markets* ("ECM Study")[19] found that in general, market participants view the ICE as a price discovery market for certain natural gas contracts. The study did not specify which markets performed this function; nevertheless, the Commission determined that the WAH contract, while not mentioned by name in the ECM Study, might warrant further study.

The Commission will rely on one of two sources of evidence—direct or indirect—to determine that the price of a contract was being used as a material price reference and therefore, serving a

[13] The term "hub" refers to a juncture where two or more natural gas pipelines are connected. Hubs also serve as pricing points for natural gas at the particular locations.

[14] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[15] *See http://www.eia.doe.gov/pub/oil_gas/natural_gas/feature_articles/2009/ngmarketcenter/ngmarketcenter.pdf.*

[16] Basis contracts denote the difference in the price of natural gas at a specified location minus the price of natural gas at the Henry Hub. The differential can be either a positive or negative value.

[17] As noted above, the Commission did not find an indication of arbitrage in connection with this contract; accordingly, that criterion was not discussed in reference to the WAH contract.

[18] The OTC Gas End of Day dataset includes daily settlement prices for natural gas contracts listed for all points in North America.

[19] *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/pr5403-07_ecmreport.pdf.*

significant price discovery function.[20] With respect to direct evidence, the Commission will consider the extent to which, on a frequent and recurring basis, cash market bids, offers or transactions are directly based on or quoted at a differential to, the prices generated on the ECM in question. Direct evidence may be established when cash market participants are quoting bid or offer prices or entering into transactions at prices that are set either explicitly or implicitly at a differential to prices established for the contract in question. Cash market prices are set explicitly at a differential to the section 2(h)(3) contract when, for instance, they are quoted in dollars and cents above or below the reference contract's price. Cash market prices are set implicitly at a differential to a section 2(h)(3) contract when, for instance, they are arrived at after adding to, or subtracting from the section 2(h)(3) contract, but then quoted or reported at a flat price. With respect to indirect evidence, the Commission will consider the extent to which the price of the contract in question is being routinely disseminated in widely distributed industry publications—or offered by the ECM itself for some form of remuneration—and consulted on a frequent and recurring basis by industry participants in pricing cash market transactions.

The Waha hub is a major trading center for natural gas in the United States. Traders, including producers, keep abreast of the prices of the WAH contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of natural gas at Waha when entering into cash market transactions for natural gas, especially those trades providing for physical delivery in the future. Traders use the ICE WAH contract, as well as other ICE basis swap contracts, to hedge cash market positions and transactions—activities which enhance the WAH contract's price discovery utility. The substantial volume of trading and open interest in the WAH contract appears to attest to its use for this purpose. While the WAH contract's settlement prices may not be the only factor influencing spot and forward transactions, natural gas traders consider the ICE price to be a critical factor in conducting OTC transactions.[21] As a result, the WAH contract satisfies the direct price reference test.

In terms of indirect price reference, ICE sells the WAH contract's prices as part of a broad package. The Commission notes that the Waha hub is a major natural gas trading point, and the WAH contract's prices are well regarded in the industry as indicative of the value of natural gas at the Waha hub. Accordingly, the Commission believes that it is reasonable to conclude that market participants are purchasing the data packages that include the WAH contract's prices in substantial part because the WAH contract prices have particular value to them. Moreover, such prices are consulted on a frequent and recurring basis by industry participants in pricing cash market transactions. In light of the above, the WAH contract meets the indirect price reference test.

NYMEX lists a futures contract that is comparable to the ICE WAH contract on its ClearPort platform called the Waha Basis Swap (Platts IFERC) futures contract. However, unlike the ICE contract, none of the trades in the NYMEX contract are executed in NYMEX's centralized marketplace; instead, all of the transactions originate as bilateral swaps that are submitted to NYMEX for clearing. The daily settlement prices of the NYMEX version of the WAH contract are influenced, in part, by the daily settlement prices of the ICE WAH contract. This is because NYMEX determines the daily settlement prices for its natural gas basis swap contracts through a survey of cash market voice brokers. Voice brokers, in turn, refer to the ICE WAH price, among other information, as an important indicator as to where the market is trading. Therefore, the ICE WAH price influences the settlement price for the NYMEX's Waha contract. This is supported by an analysis of the daily settlement prices for the NYMEX Waha Basis Swap and ICE WAH contracts. In this regard, 99 percent of the daily settlement prices for the NYMEX Waha Basis Swap contract are within one standard deviation of the WAH contract's price settlement prices.

Lastly, the fact that the WAH contract does not meet the price linkage criterion (discussed below) bolsters the argument for material price reference. As noted above, the Henry Hub is the pricing reference for natural gas in the United States. However, regional market conditions may cause the price of natural gas in another area of the country to diverge by more than the cost of transportation, thus making the Henry Hub price an imperfect proxy for the local gas price. The more variable the local natural gas price is, the more traders need to accurately hedge their price risk. Basis swap contracts provide a means of more accurately pricing natural gas at a location other than the Henry Hub. An analysis of Waha natural gas prices showed that 96 percent of the observations were more than 2.5 percent different that the contemporaneous Henry Hub prices. The average Waha basis value between January 2008 and September 2009 was −$0.98 per mmBtu with a variance of $0.38 per mmBtu.

i. **Federal Register** Comments

ICE stated in its comment letter that the WAH contract does not meet the material price reference criterion for SPDC determination. ICE argued that the Commission appeared to base the case that the WAH contract is potentially a SPDC on what it characterizes as a disputable assertion. In issuing its notice of intent to determine whether the WAH contract is a SPDC, the CFTC cited a general conclusion in its ECM study "that certain market participants referred to ICE as a price discovery market for certain natural gas contracts."[22] ICE stated that CFTC's reason is "hard to quantify as the ECM report does not mention" this contract as a potential SPDC. "It is unknown which market participants made this statement in 2007 or the contracts that were referenced."[23] In response to the above comment, the Commission notes that it cited the ECM study's general finding that some ICE natural gas contracts appear to be regarded as price discovery markets merely as an indicia that an investigation of certain ICE contracts may be warranted, and was not intended to serve as the sole basis for determining whether or not a particular contract meets the material price reference criterion.

WGCEF[24], EI[25] and FIEG[26] all stated that the WAH contract does not satisfy the material price reference criterion. The commenters argued that other contracts (physical or financial) are not indexed based on the ICE WAH contract price, but rather are indexed based on the underlying cash price series against which the ICE WAH contract is settled. Thus, they contend that the underlying cash price series is the authentic reference price and not the ICE contract itself. The Commission believes that this interpretation of price reference is too limiting in that it only considers the

[20] 17 CFR part 36, Appendix A.

[21] In addition to referencing ICE prices, natural gas market firms participating in the Waha market may rely on other cash market quotes as well as industry publications and price indices that are published by third-party price reporting firms in entering into natural gas transactions.

[22] CL 04.

[23] CL 04.

[24] CL 02.

[25] CL 05.

[26] CL 08.

final index value on which the contract is cash settled after trading ceases. Instead, the Commission believes that a cash-settled derivatives contract could meet the material price reference criteria if market participants "consult on a frequent and recurring basis" the derivatives contract when pricing forward, fixed-price commitments or other cash-settled derivatives that seek to "lock in" a fixed price for some future point in time to hedge against adverse price movements.

As noted above, the Waha hub is a major trading center for natural gas in North America. Traders, including producers, keep abreast of the prices of the WAH contract when conducting cash deals. These traders look to a competitively determined price as an indication of expected values of natural gas at the Waha hub when entering into cash market transactions for natural gas, especially those trades that provide for physical delivery in the future. Traders use the ICE WAH contract to hedge cash market positions and transactions, which enhances the WAH contract's price discovery utility. While the WAH contract's settlement prices may not be the only factor influencing spot and forward transactions, natural gas traders consider the ICE price to be a crucial factor in conducting OTC transactions.

Both EI and WGCEF stated that publication of price data in a package format is a weak justification for material price reference. These commenters argue that market participants generally do not purchase ICE data sets for one contract's prices, so the fact that ICE sells the WAH prices as part of a broad package is not conclusive evidence that market participants are buying the ICE data sets because they find the WAH prices have substantial value to them. The Commission notes that Waha is a major natural gas trading point, and the WAH contract's prices are well regarded in the industry as indicative of the value of natural gas at the Waha hub. Accordingly, the Commission believes that it is reasonable to conclude that market participants are purchasing the data packages that include the WAH contract's prices in substantial part because the WAH contract prices have particular value to them.

ii. Conclusion Regarding Material Price Reference

Based on the above, the Commission finds that the WAH contract meets the material price reference criterion because cash market transactions are being priced on a frequent and recurring basis at a differential to the WAH contract's price (direct evidence). Moreover, the ECM sells the WAH contract's price data to market participants and it is reasonable to conclude that market participants are purchasing the data packages that include the WAH contract's prices in substantial part because the WAH contract prices have particular value to them. Furthermore, such prices are consulted on a frequent and recurring basis by industry participants in pricing cash market transactions (indirect evidence).

2. Price Linkage Criterion

In its October 9, 2009, **Federal Register** notice, the Commission identified price linkage as a potential basis for a SPDC determination with respect to the WAH contract. In this regard, the final settlement of the WAH contract is based, in part, on the final settlement price of the NYMEX's physically-delivered natural gas futures contract, where the NYMEX is registered with the Commission as a DCM.

The Commission's Guidance on Significant Price Discovery Contracts [27] notes that a "price-linked contract is a contract that relies on a contract traded on another trading facility to settle, value or otherwise offset the price-linked contract." Furthermore, the Guidance notes that, "[f]or a linked contract, the mere fact that a contract is linked to another contract will not be sufficient to support a determination that a contract performs a significant price discovery function. To assess whether such a determination is warranted, the Commission will examine the relationship between transaction prices of the linked contract and the prices of the referenced contract. The Commission believes that where material liquidity exists, prices for the linked contract would be observed to be substantially the same as or move substantially in conjunction with the prices of the referenced contract." Furthermore, the Guidance proposes a threshold price relationship such that prices of the ECM linked contract will fall within a 2.5 percent price range for 95 percent of contemporaneously determined closing, settlement or other daily prices over the most recent quarter. Finally, the Commission also stated in the Guidance that it would consider a linked contract that has a trading volume equivalent to 5 percent of the volume of trading in the contract to which it is linked to have sufficient volume potentially to be deemed a SPDC ("minimum threshold").

To assess whether the WAH contract meets the price linkage criterion, Commission staff obtained price data from ICE and performed the statistical tests cited above. Staff found that while the natural gas price at the Waha hub is determined, in part, by the final settlement price of the NYMEX physically-delivered natural gas futures contract (a DCM contract), the Waha hub price is not within 2.5 percent of the settlement price of the corresponding NYMEX Henry Hub natural gas futures contract on 95 percent the days. Specifically, during the third quarter of 2009, 4.2 percent of the WAH natural gas prices derived from the ICE basis values were within 2.5 percent of the daily settlement price of the NYMEX Henry Hub futures contract. In addition, staff finds that the WAH contract fails to meet the volume threshold requirement. In particular, the total trading volume in the NYMEX Natural Gas contract during the third quarter of 2009 was 14,022,963 contracts, with 5 percent of that number being 701,148 contracts. The number of trades on the ICE centralized market in the WAH contract during the same period was 120,050 contracts (equivalent to 30,012 NYMEX contracts, given the size difference).[28] Thus, centralized-market trades in the WAH contract amounted to less than the minimum threshold.

Due to the specific criteria that a given ECM contract must meet to fulfill the price linkage criterion, the requirements, for all intents and purposes, exclude ECM contracts that are not near facsimiles of DCM contracts. That is, even though an ECM contract may specifically use a DCM contract's settlement price to value a position, which is the case of the WAH contract, a substantive difference between the two price series would rule out the presence of price linkage. In this regard, an ECM contract that is priced and traded as if it is a functional equivalent of a DCM contract likely will have a price series that mirrors that of the corresponding DCM contract. In contrast, for contracts that are not look-alikes of DCM contracts, it is reasonable to expect that the two price series would be divergent. The Waha hub and the Henry Hub are located at opposite sides of the Gulf Coast natural gas market. While the Henry Hub and the Waha hub are both primarily supply centers, each center has its own unique physical characteristics that govern the flow of the gas, as well as a geographically

[27] Appendix A to the Part 36 rules.

[28] The WAH contract is one-quarter the size of the NYMEX Henry Hub physically-delivered futures contract.

unique customer base with a different demand schedule. These differences contribute to the divergence between the two price series and, as discussed below, increase the likelihood that the "basis" contract is used for material price reference.

i. **Federal Register** Comments

EI [29] stated that the WAH and NYMEX natural gas contracts are not economically equivalent and that the WAH contract's volume is too low to affect the NYMEX natural gas futures contract. WGCEF [30] stated that the WAH contract's price is determined, in part, by the final settlement price of the NYMEX Henry Hub futures contract. However, WGCEF goes on to state that the WAH contract "(a) is not substantially the same as the NYMEX [natural gas futures contract] * * * nor (b) does it move substantially in conjunction" with the NYMEX natural gas futures contract. ICE [31] pronounced that the WAH contract's trading volume is too low to affect the price discovery process for the NYMEX natural gas futures contract. In addition, ICE stated that the WAH contract simply reflects a price differential between Waha hub and the Henry Hub; "there is no price linkage as contemplated by Congress or the CFTC in its rulemaking." FIEG [32] acknowledged that the WAH contract is a locational spread that is based in part on the NYMEX natural gas futures price, but also questioned the significance of this fact relative to the price linkage criterion since the key component of the spread is the price at Waha hub and not the NYMEX physically-delivered natural gas futures price.

ii. Conclusion Regarding the Price Linkage Criterion

Based on the above, the Commission finds that the WAH contract does not meet the price linkage criterion because it fails the price relationship and volume tests provided for in the Commission's Guidance.

3. Material Liquidity Criterion

To assess whether the WAH contract meets the material liquidity criterion, the Commission first examined volume and open interest data provided to it by ICE as a general measurement of the WAH contract's size and potential importance, and second performed a statistical analysis to measure the effect that changes to WAH prices potentially may have on prices for the NYMEX Henry Hub Natural Gas (a DCM contract), the ICE Chicago Financial Basis contract (an ECM contract), the ICE TexOK Financial Basis contract (an ECM contract) and the ICE Permian Financial Basis contract (an ECM contract).[33]

The Commission's Guidance (Appendix A to Part 36) notes that "[t]raditionally, objective measures of trading such as volume or open interest have been used as measures of liquidity." In this regard, the Commission in its October 9, 2009, **Federal Register** notice referred to second quarter 2009 trading statistics that ICE had submitted for its WAH contract. Based upon on a required quarterly filing made by ICE on July 27, 2009, the total number of WAH trades executed on ICE's electronic trading platform was 1,165 in the second quarter of 2009, resulting in a daily average of 18 trades. During the same period, the WAH contract had a total trading volume on ICE's electronic trading platform of 100,490 contracts and an average daily trading volume of 1,570 contracts. Moreover, the open interest as of June 30, 2009, was 96,371 contracts, which includes trades executed on ICE's electronic trading platform, as well as trades executed off of ICE's electronic trading platform and then brought to ICE for clearing.[34]

Subsequent to the October 9, 2009, **Federal Register** notice, ICE submitted another quarterly notification filed on November 13, 2009,[35] with updated trading statistics. Specifically, with respect to its WAH contract, 1,252 separate trades occurred on its electronic platform in the third quarter of 2009, resulting in a daily average of 19 trades. During the same period, the WAH contract had a total trading volume on its electronic platform of 120,050 contracts (which was an average of 1,819 contracts per day).[36] As of September 30, 2009, open interest in the WAH contract was 114,238 contracts.[37] Reported open interest included positions resulting from trades that were executed on ICE's electronic platform, as well as trades that were executed off of ICE's electronic platform and brought to ICE for clearing.

In the Guidance, the Commission stated that material liquidity can be identified by the impact liquidity exhibits through observed prices. Thus, to make a determination whether the WAH contract has such material impact, the Commission reviewed the relevant trading statistics (noted above). In this regard, the average number of trades per day in the second and third quarters of 2009 were well above the minimum reporting level (5 trades per day). Moreover, trading activity in the WAH contract, as characterized by total quarterly volume, indicates that the WAH contract experiences trading activity that is greater than in thinly-traded contracts.[38] Thus, it is reasonable to infer that the WAH contract could have a material effect on other ECM contracts or on DCM contracts.

To measure the effect that the WAH contract potentially could have on a DCM contract, or on another ECM contract, Commission staff performed a statistical analysis [39] using daily settlement prices (between January 2, 2008, and September 30, 2009) for the ICE WAH contract, as well as for the NYMEX Henry Hub natural gas contract

[29] CL 06.

[30] CL 02.

[31] CL 04.

[32] CL 08.

[33] As noted above, the material liquidity criterion speaks to the effect that transactions in the potential SPDC may have on trading in "agreements, contracts and transactions listed for trading on or subject to the rules of a designated contract market, a derivatives transaction execution facility, or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act."

[34] ICE does not differentiate between open interest created by a transaction executed on its trading platform versus that created by a transaction executed off its trading platform.

[35] *See* Commission Rule 36.3(c)(2), 17 CFR 36.3(c)(2).

[36] By way of comparison, the number of contracts traded in the WAH contract is similar to that exhibited on a liquid futures market and is roughly equivalent to the volume of trading for the NYMEX Palladium futures contract during this period.

[37] By way of comparison, open interest in the WAH contract is roughly equivalent to that in the ICE US Coffee "C" futures contract and the COMEX copper futures contract.

[38] Staff has advised the Commission that in its experience, a thinly-traded contract is, generally, one that has a quarterly trading volume of 100,000 contracts or less. In this regard, in the third quarter of 2009, physical commodity futures contracts with trading volume of 100,000 contracts or fewer constituted less than one percent of total trading volume of all physical commodity futures contracts.

[39] Specifically, Commission staff econometrically estimated a vector autoregression (VAR) model using daily settlement prices. A vector autoregression model is an econometric model used to capture the evolution and the interdependencies between multiple time series, generalizing the univariate autoregression models. The estimated model displays strong diagnostic evidence of statistical adequacy. In particular, the model's impulse response function was shocked with a one-time rise in WAH contract's price. The simulation results suggest that, on average over the sample period, a one percent rise in the WAH contract's price elicited a 0.8 percent increase in the NYMEX Henry Hub and Chicago prices, as well as 0.9 percent increase in the TexOk contract and a 1 percent increase in the Permian Basin contract. These multipliers of response emerge with noticeable statistical strength or significance. Based on such long run sample patterns, if the WAH contract's price rises by 10 percent, then the prices of NYMEX Henry Hub natural gas futures contract and the ICE Chicago Financial Basis contract would each rise by 8 percent. In addition, the price of ICE's TexOk Financial Basis contract would rise by 9 percent, and the price of the ICE's Permain Financial Basis would rise by 10 percent.

(a DCM contract) the ICE Chicago Financial Basis contract (an ECM contract), ICE TexOk Financial Basis contract (an ECM contract) and ICE Permian Financial Basis contract (an ECM contract).[40] The simulation results suggest that, on average over the sample period, a one percent rise in the WAH contract's price elicited a 0.8 percent increase in ICE Chicago and the NYMEX Henry Hub, a 0.9 percent increase in ICE TexOK and an equivalent increase in ICE Permian prices.

i. **Federal Register** Comments

As noted above, comments were received from seven individuals and organizations, with five comments being directly applicable to the SPDC determination of the ICE WAH contract. WGCEF, EI, FIEG and ICE generally agreed that the WAH contract does not meet the material liquidity criterion.

WGCEF[41] stated that the WAH contract does not materially affect other contracts that are listed for trading on DCMs or ECMs, as well as other over-the-counter contracts. Instead, the WAH contract is influenced by the underlying Waha cash price index and the final settlement price of the NYMEX Henry Hub natural gas futures contract, not vice versa. FIEG[42] stated that the WAH contract cannot have a material effect on NYMEX contract because the WAH contract trades on a differential and represents "one leg (and not the relevant leg) of the locational spread." The Commission's statistical analysis shows that changes in the ICE WAH contract's price significantly influences the prices of other contracts that are traded on DCMs and ECMs.

ICE opined that the Commission "seems to have adopted a five trade-per-day test to determine whether a contract is materially liquid. It is worth noting that ICE originally suggested that the CFTC use a five trades-per-day threshold as the basis for an ECM to report trade data to the CFTC." In this regard, the Commission adopted a five trades-per-day threshold as a reporting requirement to enable it to "independently be aware of ECM contracts that may develop into SPDCs" rather than solely relying upon an ECM on its own to identify any such potential SPDCs to the Commission. Thus, any contract that meets this threshold may be subject to scrutiny as a potential SPDC. As noted above, the Commission is basing a finding of material liquidity for the ICE WAH contract, in part, on the fact that there have been nearly 20 trades per day on average in the WAH contract during the second and third quarters of 2009, which is almost quadruple the five trades-per-day that is cited in the ICE comment. In addition, the Commission notes that the number of contracts per transaction in the WAH contract is high (approximately 96 contracts per transaction) and thus, as noted, trading volume (measured in contract units) is substantial. The WAH contract also has significant open interest.

ICE implied that the statistics provided by ICE were misinterpreted and misapplied by the Commission. In particular, ICE stated that the volume figures used in the Commission's analysis (cited above) "include trades made in *all listed months of each contract*" as well as in strips of contract months, and a "more appropriate method of determining liquidity is to examine the activity in a single traded month or strip of a given contract." ICE stated that only about 25 to 40 percent of the trades occurred in the single most liquid, usually prompt, month of the contract.

It is the Commission's opinion that liquidity, as it pertains to the WAH contract, is typically a function of trading activity in particular lead months and, given sufficient liquidity in such months, the WAH contract itself would be considered liquid. ICE's analysis of its own trade data confirms this to be the case for the WAH contract, and thus, the Commission believes that it applied the statistical data cited above in an appropriate manner for gauging material liquidity.

In addition, EI and ICE stated that the trades-per-day statistics that it provided to the Commission in its quarterly filing and which are cited above includes 2(h)(1) transactions, which were not completed on the electronic trading platform and should not be considered in the SPDC determination process. Commission staff asked ICE to review the data it sent in its quarterly filings. In response, ICE confirmed that the volume data it provided and which the Commission cited in its October 9, 2009, **Federal Register** notice, as well as the additional volume information it cites above, includes only transaction data executed on ICE's electronic trading platform. The Commission acknowledges that the open interest information it cites above includes transactions made off the ICE platform.[43] However, once open interest is created, there is no way for ICE to differentiate between "on-exchange" versus "off-exchange" created positions, and all such positions are fungible with one another and may be offset in any way agreeable to the position holder regardless of how the position was initially created.

ii. Conclusion Regarding Material Liquidity

Based on the above, the Commission concludes that the WAH contract meets the material liquidity criterion in that there is sufficient trading activity in the WAH contract to have a material effect on "other agreements, contracts or transactions listed for trading on or subject to the rules of a designated contract market * * * or an electronic trading facility operating in reliance on the exemption in section 2(h)(3) of the Act" (that is, an ECM).

4. Overall Conclusion

After considering the entire record in this matter, including the comments received, the Commission has determined that the WAH contract performs a significant price discovery function under two of the four criteria established in section 2(h)(7) of the CEA. Although the Commission has determined that the WAH contract does not meet the price linkage criterion at this time, the Commission has concluded that the WAH contract does meet both the material liquidity and material price reference criteria. Accordingly, the Commission is issuing the attached Order declaring that the WAH contract is a SPDC.

Issuance of this Order signals the immediate effectiveness of the Commission's authorities with respect to ICE as a registered entity in connection with its WAH contract,[44] and triggers the obligations, requirements—both procedural and substantive—and timetables prescribed in Commission rule 36.3(c)(4) for ECMs.

V. Related Matters

a. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 ("PRA")[45] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any collection of information as defined by the PRA.

[40] Natural gas prices at the Chicago, Permian, and TexOk hubs were obtained by adding the daily settlement prices of ICE's Chicago Financial Basis, Permian Basin Financial Basis and TexOk Financial Basis contracts, respectively, to the contemporaneous daily settlement prices of the NYMEX Henry Hub physically-delivered natural gas futures contract.

[41] CL 02.

[42] CL 08.

[43] Supplemental data supplied by the ICE confirmed that block trades in the third quarter of 2009 were in addition to the trades that were conducted on the electronic platform; block trades comprised 44.3 percent of all transactions in the WAH contract.

[44] See 73 FR 75888, 75893 (Dec. 12, 2008).

[45] 44 U.S.C. 3507(d).

Certain provisions of Commission rule 36.3 impose new regulatory and reporting requirements on ECMs, resulting in information collection requirements within the meaning of the PRA. OMB previously has approved and assigned OMB control number 3038–0060 to this collection of information.

b. Cost-Benefit Analysis

Section 15(a) of the CEA [46] requires the Commission to consider the costs and benefits of its actions before issuing an order under the Act. By its terms, section 15(a) does not require the Commission to quantify the costs and benefits of an order or to determine whether the benefits of the order outweigh its costs; rather, it requires that the Commission "consider" the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular order is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the Act. The Commission has considered the costs and benefits in light of the specific provisions of section 15(a) of the Act and has concluded that the Order, required by Congress to strengthen Federal oversight of exempt commercial markets and to prevent market manipulation, is necessary and appropriate to accomplish the purposes of section 2(h)(7) of the Act.

When a futures contract begins to serve a significant price discovery function, that contract, and the ECM on which it is traded, warrants increased oversight to deter and prevent price manipulation or other disruptions to market integrity, both on the ECM itself and in any related futures contracts trading on DCMs. An Order finding that a particular contract is a SPDC triggers this increased oversight and imposes obligations on the ECM calculated to accomplish this goal. The increased oversight engendered by the issue of a SPDC Order increases transparency and helps to ensure fair competition among ECMs and DCMs trading similar products and competing for the same business. Moreover, the ECM on which the SPDC is traded must assume, with respect to that contract, all the responsibilities and obligations of a registered entity under the CEA and Commission regulations. Additionally, the ECM must comply with nine core principles established by section 2(h)(7) of the Act—including the obligation to establish position limits and/or accountability standards for the SPDC. Section 4(i) of the CEA authorizes the Commission to require reports for SPDCs listed on ECMs. These increased responsibilities, along with the CFTC's increased regulatory authority, subject the ECM's risk management practices to the Commission's supervision and oversight and generally enhance the financial integrity of the markets.

c. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA") [47] requires that agencies consider the impact of their rules on small businesses. The requirements of CEA section 2(h)(7) and the Part 36 rules affect ECMs. The Commission previously has determined that ECMs are not small entities for purposes of the RFA.[48] Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that this Order, taken in connection with section 2(h)(7) of the Act and the Part 36 rules, will not have a significant impact on a substantial number of small entities.

VI. Order

a. Order Relating to the ICE Waha Financial Basis Contract

After considering the complete record in this matter, including the comment letters received in response to its request for comments, the Commission has determined to issue the following Order:

The Commission, pursuant to its authority under section 2(h)(7) of the Act, hereby determines that the Waha Financial Basis contract, traded on the IntercontinentalExchange, Inc., satisfies the statutory material liquidity and material price reference criteria for significant price discovery contracts. Consistent with this determination, and effective immediately, the IntercontinentalExchange, Inc., must comply with, with respect to the Waha Financial Basis contract, the nine core principles established by new section 2(h)(7)(C). Additionally, the IntercontinentalExchange, Inc., shall be and is considered a registered entity [49] with respect to the Waha Financial Basis contract and is subject to all the provisions of the Commodity Exchange Act applicable to registered entities. Further, the obligations, requirements and timetables prescribed in Commission rule 36.3(c)(4) governing core principle compliance by the IntercontinentalExchange, Inc., commence with the issuance of this Order.[50]

Issued in Washington, DC, on April 28, 2010, by the Commission.

David A. Stawick,

Secretary of the Commission.

[FR Doc. 2010–10324 Filed 5–4–10; 8:45 am]

BILLING CODE P

[46] 7 U.S.C. 19(a).

[47] 5 U.S.C. 601 *et seq.*

[48] 66 FR 42256, 42268 (Aug. 10, 2001).

[49] 7 U.S.C. 1a(29).

[50] Because ICE already lists for trading a contract (i.e., the Henry Financial LD1 Fixed Price contract) that was previously declared by the Commission to be a SPDC, ICE must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of this Order. 17 CFR 36.3(c)(4).

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Sunshine Act Notice

The Board of Directors of the Corporation for National and Community Service gives notice of the following meeting:

DATE AND TIME: Wednesday, May 12, 2010, 10:30 a.m.–12 p.m.

PLACE: Corporation for National and Community Service, 1201 New York Avenue, NW., Suite 8312, Washington, DC 20525 (Please go to 10th floor reception area for escort).

CALL-IN INFORMATION: This meeting is available to the public through the following toll-free call-in number: 888–790–3168 conference call access code number 4567906. Any interested member of the public may call this number and listen to the meeting. Callers can expect to incur charges for calls they initiate over wireless lines, and the Corporation will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Replays are generally available one hour after a call ends. The toll-free phone number for the replay is 800–294–4341. The end replay date: June 12, 10:59 PM (CT).

STATUS: Open.

MATTERS TO BE CONSIDERED:

10:30–11:15 a.m.

I. Chair's Opening Comments

II. Consideration of Previous Meeting's Minutes
III. CEO Report
IV. Committee Reports: Oversight, Governance, and Audit Committee; Program, Budget, and Evaluation Committee; and External Relations Committee

11:15–12 a.m.

V. Public Comments

ACCOMMODATIONS: Anyone who needs an interpreter or other accommodation should notify Ida Green at *igreen@cns.gov* or 202–606–6861 by 5 p.m., May 10, 2010.

CONTACT PERSON FOR MORE INFORMATION: Emily Samose, Office of the CEO, Corporation for National and Community Service, 10th Floor, Room 9613C, 1201 New York Avenue, NW., Washington, DC 20525. Phone (202) 606–7564. Fax (202) 606–3460. TDD: (202) 606–3472. E-mail: *esamose@cns.gov.*

Dated: April 30, 2010.

Frank R. Trinity,

General Counsel.

[FR Doc. 2010–10709 Filed 5–3–10; 4:15 pm]

BILLING CODE 6050–$$–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Notice of Proposed Solicitation for Cooperative Agreement Applications (SCAA)

AGENCY: Defense Logistics Agency, DOD.

ACTION: Proposed solicitation for cost sharing cooperative agreement applications.

SUMMARY: The Defense Logistics Agency (DLA) executes the DoD Procurement Technical Assistance Program (PTAP) by awarding cost sharing cooperative agreements to assist eligible entities in establishing or maintaining procurement technical assistance centers (PTACs) pursuant to chapter 142 of title 10, United States Code. Eligible entities include States, local governments, private nonprofit organizations, tribal organizations and economic enterprises.

In order to maintain continuity of the program, DLA will be issuing a follow-on to the Solicitation for Cooperative Agreement Applications (SCAA) issued on April 7, 2008. This SCAA, when issued, will govern the submission of applications to be considered for base year cost sharing cooperative agreement awards in Fiscal Year 2011. This SCAA will also allow for two option period awards in Fiscal Years 2012 and 2013. A proposed version of this SCAA, which contains a number of changes from the April 7, 2008 SCAA, will be posted for comment on or about May 5, 2010 at *http://www.dla.mil/db/ptap.asp* (select "*Information for PTAP funding recipients*" at the bottom of the page). Printed copies are not available for distribution.

Written comments regarding this proposed SCAA may be submitted via mail to Headquarters, Defense Logistics Agency, Office of Small Business Programs (Attn: Grants Officer), 8725 John J. Kingman Road, Suite 1127, Fort Belvoir, VA 22060–6221 or via e-mail to *PTAP@dla.mil.*

All comments must be received by June 4, 2010, for them to receive consideration. It is anticipated that the final SCAA will be posted on the DLA Web site by June 30, 2010. A notice will be posted at Grants.gov announcing the SCAA along with details on how to submit applications.

Note: Eligible entities meeting the definition of 10 U.S.C 2411(1)(D) (tribal organizations and economic enterprises) who are either current recipients of cooperative agreements under the program or who wish to apply to establish a new program need not apply under this SCAA. A separate SCAA will be issued in Fiscal Year 2011 for both the continuation of existing and the establishment of new Native American PTACs.

FOR FURTHER INFORMATION CONTACT: DLA Office of Small Business Programs at (703) 767–1660.

Dated: April 30, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2010–10540 Filed 5–4–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Revised Non-Foreign Overseas Per Diem Rates

AGENCY: Per Diem, Travel and Transportation Allowance Committee; DoD.

ACTION: Notice of revised non-foreign overseas per diem rates.

SUMMARY: The Per Diem, Travel and Transportation Allowance Committee is publishing Civilian Personnel Per Diem Bulletin Number 267. This bulletin lists revisions in the per diem rates prescribed for U.S. Government employees for official travel in Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands and Possessions of the United States. AEA changes announced in Bulletin Number 194 remain in effect. Bulletin Number 267 is being published in the **Federal Register** to assure that travelers are paid per diem at the most current rates.

DATES: Effective May 1, 2010.

SUPPLEMENTARY INFORMATION: This document gives notice of revisions in per diem rates prescribed by the Per Diem Travel and Transportation Allowance Committee for non-foreign areas outside the continental United States. It supersedes Civilian Personnel Per Diem Bulletin Number 266. Distribution of Civilian Personnel Per Diem Bulletins by mail was discontinued. Per Diem Bulletins published periodically in the **Federal Register** now constitute the only notification of revisions in per diem rates to agencies and establishments outside the Department of Defense. For more information or questions about per diem rates, please contact your local travel office. The text of the Bulletin follows: The changes in Civilian Bulletin 267 are updated rates for Hawaii.

Dated: April 30, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

BILLING CODE 5001–06–P

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

COUNTRY	LOCATION	SEASON DATES	LODGING RATE	M&IE RATE	MAX PER DIEM RATE	EFFECTIVE DATE
ALASKA	ADAK	01/01 - 12/31	120	79	199	07/01/2003
	ANCHORAGE [INCL NAV RES]	05/01 - 09/15	181	97	278	04/01/2007
		09/16 - 04/30	99	89	188	04/01/2007
	BARROW	01/01 - 12/31	159	95	254	10/01/2002
	BETHEL	01/01 - 12/31	139	87	226	01/01/2009
	BETTLES	01/01 - 12/31	135	62	197	10/01/2004
	CLEAR AB	01/01 - 12/31	90	82	172	10/01/2006
	COLDFOOT	01/01 - 12/31	165	70	235	10/01/2006
	COPPER CENTER	05/01 - 09/30	125	84	209	01/01/2009
		10/01 - 04/30	95	81	176	01/01/2009
	CORDOVA	01/01 - 12/31	95	77	172	03/01/2010
	CRAIG	04/01 - 09/30	236	84	320	03/01/2010
		10/01 - 03/31	151	76	227	03/01/2010
	DELTA JUNCTION	01/01 - 12/31	135	80	215	07/01/2008
	DENALI NATIONAL PARK	06/01 - 08/31	135	80	215	03/01/2010
		09/01 - 05/31	90	74	164	03/01/2010
	DILLINGHAM	04/15 - 10/15	185	83	268	01/01/2009
		10/16 - 04/14	169	82	251	01/01/2009
	DUTCH HARBOR-UNALASKA	01/01 - 12/31	121	86	207	01/01/2009
	EARECKSON AIR STATION	01/01 - 12/31	90	77	167	06/01/2007
	EIELSON AFB	05/01 - 09/15	175	88	263	02/01/2009
		09/16 - 04/30	75	79	154	02/01/2009
	ELMENDORF AFB	05/01 - 09/15	181	97	278	04/01/2007
		09/16 - 04/30	99	89	188	04/01/2007
	FAIRBANKS	05/01 - 09/15	175	88	263	02/01/2009
		09/16 - 04/30	75	79	154	02/01/2009
	FOOTLOOSE	01/01 - 12/31	175	18	193	10/01/2002
	FT. GREELY	01/01 - 12/31	135	80	215	07/01/2008
	FT. RICHARDSON	05/01 - 09/15	181	97	278	04/01/2007
		09/16 - 04/30	99	89	188	04/01/2007
	FT. WAINWRIGHT	05/01 - 09/15	175	88	263	02/01/2009
		09/16 - 04/30	75	79	154	02/01/2009
	GLENNALLEN	05/01 - 09/30	125	84	209	01/01/2009
		10/01 - 04/30	95	81	176	01/01/2009
	HAINES	01/01 - 12/31	109	75	184	01/01/2009
	HEALY	06/01 - 08/31	135	80	215	03/01/2010
		09/01 - 05/31	90	74	164	03/01/2010
	HOMER	05/15 - 09/15	167	85	252	01/01/2009
		09/16 - 05/14	79	78	157	01/01/2009
	JUNEAU	05/01 - 09/30	149	85	234	01/01/2009
		10/01 - 04/30	109	80	189	01/01/2009

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

COUNTRY	LOCATION	SEASON DATES	LODGING RATE	MIE RATE	MAX PER DIEM RATE	EFFECTIVE DATE
ALASKA	KAKTOVIK	01/01 - 12/31	165	86	251	10/01/2002
	KAVIK CAMP	01/01 - 12/31	150	69	219	10/01/2002
	KENAI-SOLDOTNA	05/01 - 08/31	159	90	249	03/01/2010
		09/01 - 04/30	79	82	161	03/01/2010
	KENNICOTT	01/01 - 12/31	259	94	353	01/01/2009
	KETCHIKAN	05/01 - 09/30	140	67	207	03/01/2010
		10/01 - 04/30	99	63	162	03/01/2010
	KING SALMON	05/01 - 10/01	225	91	316	10/01/2002
		10/02 - 04/30	125	81	206	10/01/2002
	KLAWOCK	04/01 - 09/30	236	84	320	03/01/2010
		10/01 - 03/31	151	76	227	03/01/2010
	KODIAK	05/01 - 09/30	141	80	221	03/01/2010
		10/01 - 04/30	99	76	175	03/01/2010
	KOTZEBUE	01/01 - 12/31	189	93	282	03/01/2010
	KULIS AGS	05/01 - 09/15	181	97	278	04/01/2007
		09/16 - 04/30	99	89	188	04/01/2007
	MCCARTHY	01/01 - 12/31	259	94	353	01/01/2009
	MCGRATH	01/01 - 12/31	165	69	234	10/01/2006
	MURPHY DOME	05/01 - 09/15	175	88	263	02/01/2009
		09/16 - 04/30	75	79	154	02/01/2009
	NOME	01/01 - 12/31	150	97	247	03/01/2010
	NUIQSUT	01/01 - 12/31	180	53	233	10/01/2002
	PETERSBURG	01/01 - 12/31	100	71	171	07/01/2008
	PORT ALSWORTH	01/01 - 12/31	135	88	223	10/01/2002
	SELDOVIA	05/15 - 09/15	167	85	252	01/01/2009
		09/16 - 05/14	79	78	157	01/01/2009
	SEWARD	05/01 - 09/30	174	89	263	03/01/2010
		10/01 - 04/30	99	81	180	03/01/2010
	SITKA-MT. EDGECUMBE	05/01 - 09/30	119	75	194	03/01/2010
		10/01 - 04/30	99	73	172	03/01/2010
	SKAGWAY	05/01 - 09/30	140	67	207	03/01/2010
		10/01 - 04/30	99	63	162	03/01/2010
	SLANA	05/01 - 09/30	139	55	194	02/01/2005
		10/01 - 04/30	99	55	154	02/01/2005
	SPRUCE CAPE	05/01 - 09/30	141	80	221	03/01/2010
		10/01 - 04/30	99	76	175	03/01/2010
	ST. GEORGE	01/01 - 12/31	129	55	184	06/01/2004
	TALKEETNA	01/01 - 12/31	100	89	189	10/01/2002
	TANANA	01/01 - 12/31	150	97	247	03/01/2010
	TOK	05/01 - 09/30	129	76	205	03/01/2010
		10/01 - 04/30	99	73	172	03/01/2010

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

COUNTRY	LOCATION	SEASON DATES	LODGING RATE	M&IE RATE	MAX PER DIEM RATE	EFFECTIVE DATE
ALASKA	UMIAT	01/01 - 12/31	350	35	385	10/01/2006
	VALDEZ	05/01 - 09/30	179	91	270	03/01/2010
		10/01 - 04/30	119	85	204	03/01/2010
	WASILLA	05/01 - 09/30	151	89	240	01/01/2009
		10/01 - 04/30	96	83	179	01/01/2009
	WRANGELL	05/01 - 09/30	140	67	207	03/01/2010
		10/01 - 04/30	99	63	162	03/01/2010
	YAKUTAT	01/01 - 12/31	105	76	181	01/01/2009
	[OTHER]	01/01 - 12/31	100	71	171	01/01/2009
AMERICAN SAMOA	AMERICAN SAMOA	01/01 - 12/31	139	75	214	08/01/2009
GUAM	GUAM (INCL ALL MIL INSTAL)	01/01 - 12/31	159	80	239	07/01/2009
HAWAII	CAMP H M SMITH	01/01 - 12/31	177	106	283	05/01/2008
	EASTPAC NAVAL COMP TELE AREA	01/01 - 12/31	177	106	283	05/01/2008
	FT. DERUSSEY	01/01 - 12/31	177	106	283	05/01/2008
	FT. SHAFTER	01/01 - 12/31	177	106	283	05/01/2008
	HICKAM AFB	01/01 - 12/31	177	106	283	05/01/2008
	HONOLULU	01/01 - 12/31	177	106	283	05/01/2008
	ISLE OF HAWAII: HILO	01/01 - 12/31	121	104	225	05/01/2010
	ISLE OF HAWAII: OTHER	01/01 - 12/31	180	108	288	05/01/2009
	ISLE OF KAUAI	01/01 - 12/31	198	115	313	05/01/2009
	ISLE OF MAUI	01/01 - 12/31	169	104	273	05/01/2009
	ISLE OF OAHU	01/01 - 12/31	177	106	283	05/01/2008
	KEKAHA PACIFIC MISSILE RANGE FAC	01/01 - 12/31	198	115	313	05/01/2009
	KILAUEA MILITARY CAMP	01/01 - 12/31	121	104	225	05/01/2010
	LANAI	01/01 - 12/31	229	124	353	05/01/2009
	LUALUALEI NAVAL MAGAZINE	01/01 - 12/31	177	106	283	05/01/2008
	MCB HAWAII	01/01 - 12/31	177	106	283	05/01/2008
	MOLOKAI	01/01 - 12/31	135	91	226	05/01/2010
	NAS BARBERS POINT	01/01 - 12/31	177	106	283	05/01/2008
	PEARL HARBOR	01/01 - 12/31	177	106	283	05/01/2008
	SCHOFIELD BARRACKS	01/01 - 12/31	177	106	283	05/01/2008
	WHEELER ARMY AIRFIELD	01/01 - 12/31	177	106	283	05/01/2008
	[OTHER]	01/01 - 12/31	121	104	225	05/01/2010
MIDWAY ISLANDS	MIDWAY ISLANDS	01/01 - 12/31	125	49	174	05/01/2010
NORTHERN MARIANA ISLANDS	ROTA	01/01 - 12/31	129	91	220	05/01/2006
	SAIPAN	01/01 - 12/31	121	98	219	06/01/2007
	TINIAN	01/01 - 12/31	138	71	209	07/01/2008
	[OTHER]	01/01 - 12/31	55	72	127	10/01/2002
PUERTO RICO	AGUADILLA	01/01 - 12/31	75	64	139	11/01/2007
	BAYAMON	01/01 - 12/31	195	82	277	10/01/2007
	CAROLINA	01/01 - 12/31	195	82	277	10/01/2007

Maximum Per Diem Rates for official travel in Alaska, Hawaii, the Commonwealths of Puerto Rico and the Northern Mariana Islands and Possessions of the United States by Federal Government civilian employees.

COUNTRY	LOCATION	SEASON DATES	LODGING RATE	M&IE RATE	MAX PER DIEM RATE	EFFECTIVE DATE
PUERTO RICO	CEIBA	05/01 - 11/30	155	57	212	08/01/2006
		12/01 - 04/30	185	57	242	08/01/2006
	FAJARDO [INCL ROOSEVELT RDS NAVSTAT]	05/01 - 11/30	155	57	212	08/01/2006
		12/01 - 04/30	185	57	242	08/01/2006
	FT. BUCHANAN [INCL GSA SVC CTR, GUAY	01/01 - 12/31	195	82	277	10/01/2007
	HUMACAO	05/01 - 11/30	155	57	212	08/01/2006
		12/01 - 04/30	185	57	242	08/01/2006
	LUIS MUNOZ MARIN IAP AGS	01/01 - 12/31	195	82	277	10/01/2007
	LUQUILLO	05/01 - 11/30	155	57	212	08/01/2006
		12/01 - 04/30	185	57	242	08/01/2006
	MAYAGUEZ	01/01 - 12/31	109	77	186	11/01/2007
	PONCE	01/01 - 12/31	139	83	222	11/01/2007
	SABANA SECA [INCL ALL MILITARY]	01/01 - 12/31	195	82	277	10/01/2007
	SAN JUAN & NAV RES STA	01/01 - 12/31	195	82	277	10/01/2007
	[OTHER]	01/01 - 12/31	62	57	119	10/01/2002
VIRGIN ISLANDS (U.S.)	ST. CROIX	04/15 - 12/14	135	92	227	05/01/2006
		12/15 - 04/14	187	97	284	05/01/2006
	ST. JOHN	04/15 - 12/14	163	98	261	05/01/2006
		12/15 - 04/14	220	104	324	05/01/2006
	ST. THOMAS	04/15 - 12/14	240	105	345	05/01/2006
		12/15 - 04/14	299	111	410	05/01/2006
WAKE ISLAND	WAKE ISLAND	01/01 - 12/31	152	16	168	05/01/2009

[FR Doc. 2010–10539 Filed 5–4–10; 8:45 am]
BILLING CODE 5001–06–C

DEPARTMENT OF DEFENSE

Department of the Army

Interim Change to the Military Freight Traffic Unified Rules Publication (MFTURP) No. 1

AGENCY: Department of the Army, DoD.

SUMMARY: The Military Surface Deployment and Distribution Command (SDDC) is providing notice that it released an interim change to the MFTURP No. 1 on April 26, 2010. The interim change adds safety requirements for Motor Carriers authorized to provide Satellite Motor Surveillance (SNS) (and DDP and PSS) for 1.1 to 1.3 Ammunition and Explosives (A&E) to Section A, Part II, Paragraph D, Transportation Protective Service (TPS) for Sensitive Conventional Arms, Ammunition and Explosives (AA&E), Classified (Secret and Confidential), and Controlled Cryptographic Items.

ADDRESSES: Submit comments to Publication and Rules Manager, Strategic Business Directorate, Business Services, 661 Sheppard Place, ATTN: SDDC–OPM, Fort Eustis, VA 23604–1644. Request for additional information may be sent by e-mail to: *tony.mayo@us.army.mil* or *jessica.c.hamilton@us.army.mil.*

FOR FURTHER INFORMATION CONTACT: Ms. Jessica Hamilton, (757) 878–8237, or Mr. Tony Mayo, (757) 878–8742.

SUPPLEMENTARY INFORMATION:

References: Military Freight Traffic Unified Rules Publications (MFTURP) No. 1.

Background: Addition of safety requirements satisfies the petition submitted by commercial carriers requesting additional safety standards for carriers providing transportation protective services (TPS).

Miscellaneous: The MFTURP No. 1, as well as the other SDDC publications, can be accessed via the SDDC Web site at: *http://www.sddc.army.mil/Public/Global%20Cargo%20Distribution/Domestic/Publications/.*

C.E. Radford, III,

Division Chief, G9, Strategic Business Directorate.

[FR Doc. 2010–10511 Filed 5–4–10; 8:45 am]
BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Navy

[Docket ID: USN–2010–0016]

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DoD.

ACTION: Notice to alter a system of records.

SUMMARY: The Department of the Navy proposes to alter a system of records in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The changes will be effective on June 4, 2010 unless comments are received that would result in a contrary determination.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

* *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

* *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301–1160.

Instructions: All submissions received must include the agency name and docket number for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public

viewing on the Internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Mrs. Miriam Brown-Lam (202) 685–6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy systems of records notice subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, has been published in the **Federal Register** and is available from Mrs. Miriam Brown-Lam, HEAD, FOIA/Privacy Act Policy Branch, the Department of the Navy, 2000 Navy Pentagon, Washington, DC 20350–2000.

The proposed systems reports, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, were submitted on April 22, 2010 to the House Committee on Government Report, the Senate Committee on Homeland Security and Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A–130, "Federal Agency Responsibilities for Maintaining Records About Individual," dated February 8, 1996 (February 20, 1996; 61 FR 6427).

Dated: April 30, 2010.

Mitchell S. Bryman,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

NM01650–1

SYSTEM NAME:

Department of the Navy (DON) Military Awards System (March 7, 2007; 72 FR 10187).

CHANGES:

* * * * *

SYSTEM LOCATION:

Delete entry and replace with "Chief of Naval Operations (DNS–35), 2000 Navy Pentagon, Washington, DC 20350–2000;

Headquarters, U.S. Marine Corps, Manpower and Reserve Affairs Department, Personnel Management Division, Military Awards Branch (MMMA), 3280 Russell Road, MCB Quantico, VA 22134–5103;

Council of Review Boards, Navy Department Board of Decorations and Medals (NDBDM), 1000 Navy Pentagon, Washington, DC 20350–1000.

Organizational elements of the Department of the Navy.

Official mailing addresses are published as an appendix to the Navy's compilation of systems of records notices."

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Delete entry and replace with "Navy Awards: All recipients of Navy and Marine Corps personal awards, to include the U.S. Coast Guard, Navy, and Marine Corps military personnel who receive personal awards from other U.S. Armed Forces; and approved unit awards from 1941 to present.

Marine Corps Awards: Approved individual awards from 1917 to present; approved unit awards from 1941 to present; digital information regarding awards approved by the Secretary of the Navy, the Commandant of the Marine Corps, and the various delegated awarding authorities throughout the Marine Corps from 2000 to present.

Navy and Marine Corps Awards: All personal awards approved at Secretariat level and unit awards, individual records contain a copy of the approved personal award recommendation which contains the member's full name, Social Security Number (SSN), award recommended, award approved, unit assigned at the time of action or period of service, originator of the award recommendation, and a copy of the approved award citation/certificate.

Tertiary records include paper records and microfilmed records which contain the member's full name, service number or Social Security Number (SSN), rank or grade, recommended award, approved award, approval date, originator of the award, the approval authority, period of the award, and chain of command information."

* * * * *

STORAGE:

Delete entry and replace with "Paper records and electronic storage media".

* * * * *

RETENTION AND DISPOSAL:

Change the word "History" to read "Historical".

SYSTEM MANAGER(S) AND ADDRESS:

Delete entry and replace with "Navy Awards: Chief of Naval Operations (DNS–35), 2000 Navy Pentagon, Washington, DC 20350–2000.

Marine Corps Awards: Headquarters U.S. Marine Corps, Manpower and Reserve Affairs Department, Personnel Management Division, Military Awards Branch (MMMA), 3280 Russell Road, MCB Quantico, Virginia 22134–5103.

Council of Review Boards, Navy Department Board of Decorations and Medals (NDBDM), 1000 Navy Pentagon, Washington, DC 20350–1000."

* * * * *

RECORD ACCESS PROCEDURES:

Delete entry and replace with "Navy individuals seeking access to information about themselves contained in this system of records should contact their local Personnel Support Activity or Personnel Support Detachment for a search of their Navy military personnel record or write to the Chief of Naval Operations (DNS–35), 2000 Navy Pentagon, Washington, DC 20350–2000.

Marine Corps individuals seeking access to information about themselves contained in this system of records should contact their unit administrative officer (G–1/S–1) for a search of their Service Record Book/Officer Qualification Record or write to Headquarters, U.S. Marine Corps, Manpower and Reserve Affairs Department, Personnel Management Division, Military Awards Branch (MMMA), 3280 Russell Road, MCB Quantico, Virginia 22134–5103.

Individuals seeking access to information about themselves contained in Navy Department Board of Decorations and Medals (NDBDM) system of records should contact the Council of Review Boards, NDBDM, 1000 Navy Pentagon, Washington, DC 20350–1000.

All other individuals seeking access to information about themselves contained in this system of records should contact either the Chief of Naval Operations, Navy Awards Branch (DNS–35), 2000 Navy Pentagon, Washington, DC 20350–2000 (for U.S. Navy awards) or Headquarters, U.S. Marine Corps, Manpower and Reserve Affairs Department, Personnel Management Division, Military Awards Branch (MMMA), 3280 Russell Road, MCB Quantico, Virginia 22134–5103 (for U.S. Marine Corps awards).

Requests should include full name, Social Security Number (SSN), time period of award, and must be signed. The system manager may require an original signature or a notarized signature as a means of proving the identity of the individual requesting access to the records."

* * * * *

NM01650–1

SYSTEM NAME:

Department of the Navy (DON) Military Awards System

SYSTEM LOCATION:

Chief of Naval Operations (DNS–35), 2000 Navy Pentagon, Washington, DC 20350–2000;

Headquarters, U.S. Marine Corps, Manpower and Reserve Affairs Department, Personnel Management

Division, Military Awards Branch (MMMA), 3280 Russell Road, MCB Quantico, VA 22134–5103;

Council on Review Boards, Navy Department Board of Decorations and Medals (NDBDM), 1000 Navy Pentagon, Washington, DC 20350–1000;

Organizational elements of the Department of the Navy. Official mailing addresses are published as an appendix to the Navy's compilation of systems of records notices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Navy Awards: All recipients of Navy and Marine Corps personal awards, to include the U.S. Coast Guard, Navy, and Marine Corps military personnel who receive personal awards from other U.S. Armed Forces; and approved unit awards from 1941 to present.

Marine Corps Awards: Approved individual awards from 1917 to present; approved unit awards from 1941 to present; digital information regarding awards approved by the Secretary of the Navy, the Commandant of the Marine Corps, and the various delegated awarding authorities throughout the Marine Corps from 2000 to present.

Navy and Marine Corps Awards: All personal awards approved at Secretariat level and unit awards, individual records contain a copy of the approved personal award recommendation which contains the member's full name, Social Security Number (SSN), award recommended, award approved, unit assigned at the time of action or period of service, originator of the award recommendation, and a copy of the approved award citation/certificate.

Tertiary records include paper records and microfilmed records which contain the member's full name, service number or Social Security Number (SSN), rank or grade recommended award, approved award, approval date, originator of the award, the approval authority, period of the award, and chain of command information.

CATEGORIES OF RECORDS IN THE SYSTEM:

Approved individual personal awards for 1967 and continuing; approved unit awards for 1941 and continuing; Navy Department Awards Web Service—File includes awards approved by the Secretary of the Navy and those authorized for approval by subordinate commanders. Record includes service member's name, service number/Social Security Number, award recommended, and award approved. A second section of the file contains activities awarded Unit Awards and the dates of eligibility; microfilm copies of approved World War II—1967 personal awards; Navy Department Awards Web Service electronic data base that includes data extracted from OPNAV Form 1650/3, Personal Award Recommendation, such as name, Social Security Number (SSN), type of award, approval authority, recommended award, approved award, meritorious start and end dates, service status of recipient, originator of the recommendation, designator, Unit Identification Codes, officer or enlisted, service component, rate/rating, pay grade, number of award recommended, assigned billet of individual, campaign designation, classified or unclassified designated award, date of recommendation, award approved date, approved award, chain of command data, extraordinary heroism determination, letter type, board serial number, pertinent facts, date forwarded to Secretary of the Navy, Board's recommendation, participating command field, Board meeting data, receipt date by Board of Decorations and Medals, name of unit, name of ship, command points of contact that includes telephone numbers and email addresses.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 5013, Secretary of the Navy; 10 U.S.C. 5041, Headquarters, Marine Corps; Secretary of the Navy Instruction 1650.1H, Navy and Marine Corps Awards Manual; and E.O. 9397 (SSN), as amended.

PURPOSE(S):

To maintain records of military personal awards and unit awards and to electronically process award recommendations.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act of 1974, these records contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The DoD 'Blanket Routine Uses' that appear at the beginning of the Navy's compilation of systems of records notices apply to this system.

To public and private organizations, including news media, for the purpose of granting access and/or publicizing awards or honors.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper records and electronic storage media.

RETRIEVABILITY:

Name, Social Security Number (SSN), and individual unit name.

SAFEGUARDS:

Automated database requires authorized access; password protected; some user sites only have read capability; designated user capability regarding add/delete/change functions. Paper and microfiche records are under the control of authorized personnel during working hours and the office space in which records are located is locked outside official working hours.

RETENTION AND DISPOSAL:

Permanent. A duplicate copy of the active file is provided to the National Archives and Records Administration (NARA). Historical files for the years 1967 to 1989 have been transferred to NARA.

SYSTEM MANAGER(S) AND ADDRESS:

Navy Awards: Chief of Naval Operations (DNS–35), 2000 Navy Pentagon, Washington, DC 20350–2000.

Marine Corps Awards: Headquarters U.S. Marine Corps, Manpower and Reserve Affairs Department, Personnel Management Division, Military Awards Branch (MMMA), 3280 Russell Road, MCB Quantico, Virginia 22134–5103.

Council of Review Boards, Navy Department Board of Decorations and Medals (NDBDM), Building 36, Washington Navy Yard, 720 Kennon Street, SE., Room 135, Washington, DC 20374–5023.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should contact their local Personnel Support Activity or Personnel Support Detachment for a search of their Navy military personnel record or write to the Chief of Naval Operations (DNS–35), 2000 Navy Pentagon, Washington, DC 20350–2000.

Marine Corps personnel seeking to determine whether information about themselves is contained in this system of records should contact their unit administrative officer (G–1/S–1) for a search of their Service Record Book/ Officer Qualification Record or write to Headquarters U.S. Marine Corps, Manpower and Reserve Affairs Department, Personnel Management Division, Military Awards Branch (MMMA), 3280 Russell Road, MCB Quantico, Virginia 22134–5103.

All other individuals seeking to determine whether information about themselves is contained in this system of records should contact either the

Chief of Naval Operations, Navy Awards Branch (DNS–35), 2000 Navy Pentagon, Washington, DC 20350–2000 (for U.S. Navy awards) or Headquarters U.S. Marine Corps, Manpower and Reserve Affairs Department, Personnel Management Division, Military Awards Branch (MMMA), MCB Quantico, Virginia 22134–5103 (for U.S. Marine Corps awards).

RECORD ACCESS PROCEDURES:

Navy individuals seeking access to information about themselves contained in this system of records should contact their local Personnel Support Activity or Personnel Support Detachment for a search of their Navy military personnel record or write to the Chief of Naval Operations (DNS–35), 2000 Navy Pentagon, Washington, DC 20350–2000.

Marine Corps individuals seeking access to information about themselves contained in this system of records should contact their unit administrative officer (G–1/S–1) for a search of their Service Record Book/Officer Qualification Record or write to Headquarters, U.S. Marine Corps, Manpower and Reserve Affairs Department, Personnel Management Division, Military Awards Branch (MMMA), 3280 Russell Road, MCB Quantico, Virginia 22134–5103.

Individuals seeking access to information about themselves contained in Navy Department Board of Decorations and Medals (NDBDM) system of records should contact the Council of Review Boards, Navy Department Board of Decorations and Medals (NDBDM), 1000 Navy Pentagon, Washington, DC 20350–1000.

All other individuals seeking access to information about themselves contained in this system of records should contact either the Chief of Naval Operations, Navy Awards Branch (DNS–35), 2000 Navy Pentagon, Washington, DC 20350–2000 (for U.S. Navy awards) or Headquarters, U.S. Marine Corps, Manpower and Reserve Affairs Department, Personnel Management Division, Military Awards Branch (MMMA), 3280 Russell Road, MCB Quantico, Virginia 22134–5103 (for U.S. Marine Corps awards).

Requests should include full name, Social Security Number (SSN), time period of award, and must be signed. The system manager may require an original signature or a notarized signature as a means of proving the identity of the individual requesting access to the records.

CONTESTING RECORD PROCEDURES:

The Navy's rules for accessing records and contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Navy Department Awards Web Service; OPNAV Form 1650/3; Personal Award Recommendation Form; general orders; military personnel file; medical file; deck logs; command histories; award letter 1650.

Marine Corps Awards histories; Marine Corps Awards Processing System; Personal Award Recommendation (OPNAV 1650/3); Marine Corps orders; official military records; command histories; historical paper copies of personal award citations; and microfilm copies of Navy and Marine Corps 3x5 award cards.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2010–10541 Filed 5–4–10; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before June 4, 2010.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Education Desk Officer, Office of Management and Budget, 725 17th Street, NW., Room 10222, New Executive Office Building, Washington, DC 20503, be faxed to (202) 395–5806 or e-mailed to *oira_submission@omb.eop.gov* with a cc: to *ICDocketMgr@ed.gov.*

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or recordkeeping burden. OMB invites public comment.

Dated: April 29, 2010.

James Hyler,

Acting Director, Information Collection Clearance Division, Regulatory Information Management Services, Office of Management.

Office of Elementary and Secondary Education

Type of Review: New.

Title: Evaluation and Accountability Reports for Title II, Part D of ESEA.

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 52.
Burden Hours: 1,560.

Abstract: Sections 2402(a)(7) and 2413(b)(4) of the Elementary and Secondary Education Act (ESEA) require States and local educational agencies (LEAs) that receive Title II, Part D grant funds to conduct rigorous evaluation of the effectiveness of Title II, Part D formula and competitive grant-funded projects, activities and strategies in integrating technology into curricula and instruction and improving student achievement. The purpose of this reporting requirement is to identify from the results of those evaluations innovative projects, activities and strategies that effectively infuse technology with curriculum and instruction, show evidence of positive impacts for student learning, and can be widely replicated by other State educational agencies and LEAs.

Requests for copies of the information collection submission for OMB review may be accessed from *http://edicsweb.ed.gov,* by selecting the "Browse Pending Collections" link and by clicking on link number 4282. When

you access the information collection, click on "Download Attachments" to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue, SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to the Internet address *ICDocketMgr@ed.gov* or faxed to 202–401–0920. Please specify the complete title of the information collection when making your request.

Comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 2010–10463 Filed 5–4–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Office of Innovation and Improvement; Overview Information; Promise Neighborhoods Program

Notice inviting applications for new awards for fiscal year (FY) 2010.

Catalog of Federal Domestic Assistance (CFDA) Number: 84.215P.

Dates:

Applications Available: May 5, 2010.

Deadline for Notice of Intent to Apply: May 21, 2010.

Date of Pre-Application Webinars: Wednesday, May 5, 2010 and Monday, May 10, 2010.

Deadline for Transmittal of Applications: June 25, 2010.

Deadline for Intergovernmental Review: August 24, 2010.

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: The Department of Education Appropriations Act, 2010 provided funds for Promise Neighborhoods under the legislative authority of the Fund for the Improvement of Education Program (FIE), title V, part D, subpart 1, sections 5411 through 5413 of the Elementary and Secondary Education Act of 1965, as amended (ESEA) (20 U.S.C. 7243–7243b). FIE supports nationally significant programs to improve the quality of elementary and secondary education at the State and local levels and help all children meet challenging State academic content and student academic achievement standards.

The purpose of Promise Neighborhoods is to improve significantly the educational and developmental outcomes of children in our most distressed communities, and to transform those communities by—

(1) Supporting efforts to improve child outcomes and ensure that data on those outcomes are communicated and analyzed on an ongoing basis by leaders and members of the community;

(2) Identifying and increasing the capacity of eligible entities (as defined in this notice) that are focused on achieving results and building a college-going culture (as defined in this notice) in the neighborhood;

(3) Building a complete continuum of cradle-through-college-to-career solutions (continuum of solutions) (as defined in this notice), which has both academic programs and family and community supports (both as defined in this notice), with a strong school or schools at the center. Academic programs must include (a) High-quality early learning programs designed to improve outcomes in multiple domains of early learning (as defined in this notice); (b) programs, policies, and personnel for children in kindergarten through the 12th grade that are linked to improved academic outcomes; and (c) programs that prepare students for college and career success. Family and community supports must include programs to improve student health, safety, community stability, family and community engagement, and student access to 21st century learning tools. The continuum of solutions also must be linked and integrated seamlessly (as defined in this notice) so there are common outcomes, a focus on similar milestones, support during transitional time periods, and no time or resource gaps that create obstacles for students in making academic progress. The continuum also must be based on the best available evidence including, where available, strong or moderate evidence (as defined in this notice), and include programs, policies, practices, services, systems, and supports that result in improving educational and developmental outcomes for children from cradle through college to career;

(4) Integrating programs and breaking down agency "silos" so that solutions are implemented effectively and efficiently across agencies;

(5) Supporting the efforts of eligible entities, working with local governments, to build the infrastructure of policies, practices, systems, and resources needed to sustain and "scale up" proven, effective solutions across the broader region beyond the initial neighborhood; and

(6) Learning about the overall impact of Promise Neighborhoods and about the relationship between particular strategies in Promise Neighborhoods and student outcomes, including a rigorous evaluation of the program.

Background: Children who are from low-income families and grow up in high-poverty neighborhoods face academic and life challenges above and beyond the challenges faced by children who are from low-income families who grow up in neighborhoods without a high concentration of poverty. A Federal evaluation of the reading and mathematics outcomes of elementary students in 71 schools in 18 districts and 7 States found that even when controlling for individual student poverty, there is a significant negative association between school-level poverty and student achievement.[1] The evaluation found that students have lower academic outcomes when a higher percentage of their same-school peers qualify for free and reduced-priced lunch (FRPL) compared to when a lower percentage of their same-school peers qualify for FRPL. Another study found that, even when controlling for a student's own socioeconomic status, there is a significant negative association between individual student achievement growth during high school and the socioeconomic status of students in the school.[2] The compounding effects of neighborhood poverty continue later in life: A third study found that, for children with similar levels of family income, growing up in a neighborhood where the number of families in poverty was between 20 and 30 percent increased the chance of downward economic mobility—moving down the income ladder relative to their parents—by more than 50 percent compared with children who grew up in neighborhoods with under 10 percent of families in poverty.[3]

Because challenges in distressed communities with high concentrations of poverty are interrelated, the Department, through the Promise Neighborhoods Program, is taking a comprehensive approach to ensure that children have access to a continuum of cradle-through-college-to-career solutions designed to support academic achievement, healthy development, and college and career success.

[1] Westat and Policy Studies Associate. *The longitudinal evaluation of school change and performance (LESCP) in title I schools.* Prepared for the U.S. Department of Education. Available January 2010 online at *http://www.policystudies.com/studies/school/lescp_vol2.pdf.*

[2] Rumberger, Russell W., & Palardy, G. J. "Does segregation still matter? The impact of student composition on academic achievement in high school," *Teacher College Record,* 107(9), Sept 2005.

[3] Sharkey, Patrick. "Neighborhoods and the Black-White Mobility Gap." Economic Mobility Project: An Initiative of The Pew Charitable Trusts, 2009.

To effectively improve outcomes for children in these distressed communities, schools, academic programs, and family and community supports must include several core features:

(a) Organizations and schools implementing academic programs and family and community supports that have the capacity to collect, analyze, and use data to evaluate their efforts.

(b) Academic programs, family and community supports, and schools that work together and closely integrate their efforts so that time and resource gaps that contribute to children missing academic and developmental milestones do not occur.

(c) Academic programs and family and community supports that are managed, directly or indirectly, by a leader and an organization that can engage the community and are accountable for results.

(d) Schools, academic programs, and family and community supports that are implemented by using a "place-based" approach that leverages investments by focusing resources in targeted places, drawing on the compounding effect of well-coordinated actions.[4]

Consistent with this approach, we believe that it is important for communities to develop a comprehensive neighborhood revitalization strategy that addresses each of the essential neighborhood assets (as defined in this notice), which include accessible developmental, commercial, recreational, physical, and social assets that are vital to transforming distressed neighborhoods into healthy and vibrant communities of opportunity. We believe that Promise Neighborhoods will be most successful when they are part of, and contributing to, a city's or region's broader neighborhood revitalization strategy. Because Promise Neighborhoods focuses on accessible, high-quality academic programs, effective schools, and family and community supports, which are all primarily developmental assets, the program is a Federal investment designed, in part, to support the implementation of a broader comprehensive neighborhood revitalization strategy. Only through the development of such comprehensive neighborhood revitalization plans, which embrace the coordinated use of programs and resources to effectively address the interrelated needs within a community, will the broader vision of neighborhood transformation occur.

Through this notice, the Department is establishing priorities and requirements, and inviting applications, for one-year grants that will support the development of a plan to implement a Promise Neighborhood. At the conclusion of the planning grant period, grantees should, at a minimum, have a feasible plan to implement a continuum of solutions with the potential to improve results for children in the community being served.

To be eligible for a planning grant, an eligible entity must operate a school or partner with at least one school, and coordinate with the school's local educational agency (LEA). The school or schools must be in a geographically defined area in which there are multiple signs of distress based on indicators of need (as defined in this notice) and other relevant indicators. Examples of signs of distress are low-performing schools (as defined in this notice); significant achievement gaps among the subgroups of students identified in section 1111(b)(3)(C)(xiii) of the ESEA; high dropout rates; significant levels of child poverty; high student mobility rates; high rates of crime, including violent crime; high rates of vacant or substandard homes; and prevalent indicators of poor health, such as asthma, poor nutrition, dental problems, obesity, or avoidable developmental delays (*e.g.,* delays in cognitive, communication, adaptive, physical, and socio-emotional development).

As described in this notice, Promise Neighborhoods planning grantees will undertake the following activities during the planning year:

(1) Conduct a comprehensive needs assessment of children along the cradle-through-college-to-career continuum that builds on the statement of need prepared to address the selection criteria in this notice, and includes the collection of data for the academic and family and community support indicators described in this notice for children in the geographic area [5] proposed to be served.

(2) Conduct a segmentation analysis (as defined in this notice) of the needs in the neighborhood to better target solutions for the children in that neighborhood.

(3) Develop a plan to deliver the continuum of solutions that addresses the challenges and gaps identified through the needs assessment and segmentation analysis.

(4) Work with public and private agencies, organizations (including philanthropic organizations), and individuals to gather and leverage resources needed to support the financial sustainability of the plan. Planning grantees must demonstrate this financial sustainability by identifying the sources and amounts of current Federal, State, and local funds, including public and private funds, that can be used for the project.

(5) Identify strategies for building upon and leveraging high-quality academic programs and family and community supports; existing and anticipated Federal resources, including the American Recovery and Reinvestment Act of 2009 (ARRA); and existing and anticipated investments in neighborhood revitalization efforts and similar place-based initiatives funded by other Federal agencies such as the U.S. Departments of Housing and Urban Development, Health and Human Services, and Justice. Efforts funded by other Federal agencies include programs such as HOPE VI and Choice Neighborhoods, Health Centers, and the Byrne Criminal Justice Innovation and Weed and Seed Programs.

Note: The Departments of Health and Human Services, Housing and Urban Development, and Justice, along with the Department of Education, may establish incentives in future competitions for communities intending to implement more than one of these place-based initiatives.

(6) Build community support for and involvement in the development of the plan, which includes establishing outcomes for children in the neighborhood that are communicated and analyzed on an ongoing basis by leaders and members of the community.

(7) Obtain commitments from partners to work long-term to implement the plan, help ensure continued programmatic success of their plan, and develop a strategy to hold partners accountable for meeting performance goals and milestones.

(8) Plan, build, adapt, or expand a comprehensive, longitudinal data management system, while abiding by Federal, State, and other privacy laws and requirements, for all academic and family and community support indicators, as described in this notice, as well as for additional indicators needed for the Promise Neighborhoods evaluation, such as demographic characteristics.

(9) Work with a national evaluator for Promise Neighborhoods. Planning grantees must cooperate with the national evaluator to ensure their project design and data collection plan allows for a rigorous evaluation, using

[4] Memorandum from the Office of Management and Budget (OMB). *Developing Effective Place-Based Policies for the FY 2011 Budget.* August, 11, 2009. Available online at *http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09–28.pdf.*

[5] For the purposes of this notice, the Department uses the terms "neighborhood" and "geographic area" interchangeably.

standard methodologies across Promise Neighborhoods sites, of the overall impact of the Promise Neighborhoods Program and the relationship between particular solutions pursued by the grantee and student outcomes.

(10) Participate in a community of practice (as described in this notice).

The Department will monitor the grantees' progress toward completion of these activities. During the planning year, grantees must be able to demonstrate performance, or show significant progress toward completion, of activities (1)–(10), including by responding to the Department's questions and concerns regarding progress.

In subsequent years, contingent on the availability of funds, the Department intends to conduct competitions for Promise Neighborhoods implementation grants, as well as competitions for new Promise Neighborhoods planning grants. While all eligible entities will be able to apply for implementation grants, eligible entities that have effectively carried out the planning activities described in this notice, whether independently or with a Promise Neighborhoods planning grant, are likely to be well positioned with the plan, commitments, data, and organizational leadership and capacity necessary to develop a quality application for an implementation grant.

Applicants will be at different points of readiness, in terms of developing a plan, when they apply for a planning grant. For that reason, we are requiring applicants to demonstrate throughout the application their: (a) Current organizational capacity to plan for and implement a Promise Neighborhood, including the expertise of their management team and partners; (b) prior experience in carrying out neighborhood revitalization or school improvement initiatives, placing emphasis on the applicant's performance and on the impact of its work; and (c) ability to ensure ongoing sustainability of Promise Neighborhood activities.

Because a diverse group of communities could benefit from Promise Neighborhoods, the Secretary establishes an absolute priority for applications that propose to serve one or more rural communities only (as defined in this notice) and an absolute priority for applications that propose to serve one or more Indian Tribes (as defined in this notice). Child poverty rates in rural areas are higher than in urban areas [6] and more than one fifth of the Nation's 2,000 "dropout factories," in which the graduation rate is less than 60 percent, are located in rural areas.[7] Our focus on rural communities is consistent with the Senate Appropriations Committee report on the FY 2010 Department of Education, Appropriations Act—S. REP. No. 111–66 at 192 (August 4, 2009). Compared to White students, American Indian students have lower academic outcomes and higher poverty rates.[8] Moreover, American Indian and Alaska Native students have a graduation rate of less than 50 percent nationally.[9]

The Secretary also recognizes that a broad set of solutions is required to improve academic and developmental outcomes for children and to transform communities. In that regard, the Secretary establishes an invitational priority to signal our interest in applicants addressing the unique needs of students with disabilities and students with limited English proficiency, and solutions related to increasing internet connectivity, improving civic engagement, and accessing the arts and humanities.

Priorities: We are establishing these priorities for the FY 2010 grant competition only, in accordance with section 437(d)(1) of the General Education Provisions Act (GEPA), 20 U.S.C. 1232(d)(1).

Absolute Priorities: These priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet either Absolute Priority 1, Absolute Priority 2, or Absolute Priority 3.

Note: Applicants must indicate in their application whether they are applying under Absolute Priority 1, Absolute Priority 2, or Absolute Priority 3. An applicant that applies under Absolute Priority 2, but is not eligible for funding under Absolute Priority 2, or applies under Absolute Priority 3, but is not eligible for funding under Absolute Priority 3, may be considered for funding under Absolute Priority 1.

These priorities are:

Absolute Priority 1: Proposal To Develop a Promise Neighborhood Plan

To meet this priority, an applicant must submit a proposal for how it will plan to create a Promise Neighborhood. This proposal must—

1. Describe the geographically defined area to be served and the level of distress in that area based on indicators of need and other relevant indicators. Applicants may propose to serve multiple, non-contiguous geographically defined areas. In cases where target areas are not contiguous, the applicant must explain its rationale for including non-contiguous areas;

2. Describe how the applicant will plan to build a continuum of solutions (as defined in this notice) designed to significantly improve educational outcomes and to support the healthy development and well-being of children in the neighborhood. The plan to be developed by the applicant must ensure that children in the target school or schools described in paragraph 2(a)(i), 2(a)(ii), or 2(a)(iii) have access to a complete continuum of solutions. The applicant must explain how it will use its needs assessment and segmentation analysis to determine the children with the highest needs and ensure that they receive the appropriate services from the continuum of solutions. Each applicant will propose solutions, such as programs, policies, practices, services, systems, and supports that will result in improvements on the project indicators, as defined in this notice and described in paragraph 10 of this priority. There may be more than one solution for each project indicator, and a single solution may contribute to improvement on more than one project indicator. Applicants are not required to propose solutions for program indicators (as defined in this notice) that are not also project indicators (see paragraph 10 of this priority for an explanation of the difference between project indicators and program indicators).

Although the continuum of solutions must be designed to significantly improve outcomes for children in the neighborhood, applicants may also propose to plan for solutions for adults in the neighborhood that support student learning, such as family literacy programs. If an applicant proposes solutions for adults, the application must include an explanation of how the services for adults directly align with improved academic and family and community support outcomes for children.

The core component of the applicant's proposed continuum of solutions must be a strategy, or a plan to develop a strategy, to—

(a)(i) Significantly improve one or more persistently lowest-achieving schools (as defined in this notice) in the neighborhood by implementing one of the four school intervention models (turnaround model, restart model, school closure, or transformation model)

[6] American Community Survey, 2006.

[7] Balfanz, Robert, Letgers, N. *Locating the Dropout Crisis: Which High Schools Produce the Nation's Dropouts?* Johns Hopkins University, 2004.

[8] Institute for Education Sciences. *Status and Trends in the Education of American Indians and Alaska Natives,* 2008.

[9] The Civil Rights Project. *The Dropout/Graduation Crisis Among American Indian and Alaska Native Students: Failure to Respond Places the Future of Native Peoples at Risk,* 2010.

described in Appendix C of the Race to the Top Notice Inviting Applications for New Awards for FY 2010, 74 FR 59836, 59866 (November 18, 2009);

(ii) Significantly improve one or more low-performing schools in the neighborhood that is not also a persistently lowest-achieving school, by implementing ambitious, rigorous, and comprehensive interventions to assist, augment, or replace schools, which may include implementing one of the four school intervention models (turnaround model, restart model, school closure, or transformation model) described in Appendix C of the Race to the Top Notice Inviting Applications for New Awards for FY 2010, 74 FR 59836, 59866 (November 18, 2009), or may include another model of sufficient ambition, rigor, and comprehensiveness to significantly improve academic and other outcomes for students, with elements that include addressing the effectiveness of teachers and leaders and the school's use of time and resources, including increased learning time (as defined in the notice); or

(iii) Support and sustain one or more effective schools (as defined in this notice) in the neighborhood by providing academic programs in a manner that significantly enhances and expands current efforts to improve the academic outcomes of the children in the neighborhood.

Note regarding school reform strategies: So as not to penalize an applicant from working with an LEA that has implemented rigorous reform strategies prior to the publication of this notice, an applicant is not required to propose a new reform strategy in place of an existing reform strategy in order to be eligible for a Promise Neighborhoods planning grant. For example, an LEA might have begun to implement improvement activities that meet many, but not all, of the elements of a transformation model of school intervention.

In this case, the applicant could propose, as part of its Promise Neighborhood, to work with the LEA as the LEA continues with its reforms;

(b) Ensure, as appropriate, that children in the neighborhood who do not attend the school or schools described in paragraph 2(a)(i), 2(a)(ii), or 2(a)(iii) have access to solutions designed to significantly improve educational and developmental outcomes. Examples of these solutions are—

(i) High-quality early learning programs designed to improve outcomes in multiple domains of early learning for young children;

(ii) After-school and other programs that provide increased learning time (as defined in the notice);

(iii) Supports to address barriers to student achievement, such as family and community supports;

(iv) For children in kindergarten through the 12th grade, instructional programs based on the best available evidence including, where available, strong or moderate evidence that the programs improve educational outcomes;

(v) Multiple pathways for students to earn regular high school diplomas (*e.g.,* using schools that serve the needs of over-aged, under-credited, or other students with an exceptional need for flexibility regarding when they attend school or the additional supports they require; awarding credit based on demonstrated evidence of student competency; or offering dual-enrollment options); or

(vi) Other solutions based on the best available evidence including, where available, strong or moderate evidence that the solutions improve educational and developmental outcomes.

(c) To the extent feasible and appropriate, the plan to be developed by the applicant must leverage and integrate existing high-quality programs in the neighborhood into the continuum of solutions. An applicant must identify in its application the school or schools described in paragraph 2(a)(i), 2(a)(ii), or 2(a)(iii) of this priority. In cases where an eligible applicant operates a school or partners with a school that does not serve all students in the neighborhood, the applicant must partner with at least one additional school or schools that serves students in the neighborhood. In cases where an eligible applicant is a nonprofit organization that manages, operates, or partners with a private school in the neighborhood, and the school does not serve all students in the neighborhood, the applicant must partner with at least one additional public school or schools that serve students in the neighborhood.

(d) As part of the description of how the applicant will plan to build a continuum of solutions, an applicant must—

(i) Propose solutions based on the best available evidence including, where available, strong or moderate evidence that the applicant will plan to implement in the geographic area proposed to be served;

(ii) Describe the evidence supporting each proposed solution; and

(iii) Propose one or more partners that will participate in the implementation of each solution (in any case in which the applicant does not implement the solution directly);

3. Describe the applicant's organizational capacity to plan and implement a Promise Neighborhood, including the applicant's experience and lessons learned, in all of the following areas:

(a) Working with the school or schools described in paragraph 2 of this priority; the LEA in which those schools are located; Federal, State, and local government leaders; and other service providers.

(b) Serving the neighborhood and its residents. The application must include a description of the applicant's and partners' historical commitment and service to the neighborhood.

(c) Collecting, analyzing, and using data for decision-making and ongoing improvement.

(d) Creating formal and informal relationships, and generating community support to achieve results.

(e) Securing and integrating funding streams from multiple public and private sources.

(f) Implementing efforts similar or related to the proposed Promise Neighborhood. In the case of a newly created eligible entity, the applicant must describe the prior performance of its management team in developing and managing projects or programs similar to the proposed Promise Neighborhood;

4. Describe how the applicant will plan to sustain and "scale up" the proposed Promise Neighborhood across the broader region beyond the initial neighborhood over time. This must include a description of how the applicant will estimate during the planning phase the start-up and operating costs per child, including indirect and administrative costs, for each solution proposed in its application, and how the applicant will measure these costs during the implementation phase;

5. Describe the commitment the applicant anticipates receiving from partners by—

(a) Providing a preliminary memorandum of understanding, signed by each organization or agency with which it would partner in planning and implementing the proposed Promise Neighborhood. The preliminary memorandum of understanding must describe—

(i) Each partner's financial and programmatic commitment;

(ii) How each partner's existing vision, theory of change (as defined in this notice), theory of action (as defined in this notice), and existing activities align with those of the proposed Promise Neighborhood; and

(iii) The governance structure of the proposed Promise Neighborhood, including how the eligible entity's governing board or advisory board is

representative of the geographic area proposed to be served (as defined in this notice), and how residents of the geographic area would have an active role in the organization's decision-making; and

(b) Explaining how the applicant will plan to secure a commitment from local, State, and Federal government leaders to develop an infrastructure of policies, practices, systems, and resources that supports the continuum of solutions in the proposed Promise Neighborhood and "scales up" those elements of the continuum that are proven effective;

6. Describe how the applicant will plan to track available sources and funding levels of Federal, State, and local funds that could be utilized in the project;

7. Describe how the applicant will plan to identify Federal, State, or local policies, regulations, or other requirements that would impede the applicant in achieving its goals and report those impediments to the Department and other relevant agencies;

8. Describe how the applicant will plan to use data to manage program implementation, inform decision-making, engage stakeholders, and measure success. The applicant must describe—

(a) Its proposal to plan, build, adapt, or expand a longitudinal data system that measures academic and family and community support indicators for all children in the neighborhood, disaggregated by the subgroups listed in section 1111(b)(3)(C)(xiii) of the ESEA;

(b) How the applicant will link the longitudinal data system to school-based, LEA, and State data systems; make the data accessible to program partners, researchers, and evaluators while abiding by Federal, State, and other privacy laws and requirements; and manage and maintain the system;

(c) How the applicant will use rapid-time (as defined in this notice) data both in the planning year and, once the Promise Neighborhood is implemented, for continuous program improvement; and

(d) How the applicant will document the planning process, including by describing lessons learned and best practices;

9. Describe the applicant's commitment to work with the Department and with a national evaluator for Promise Neighborhoods to ensure that data collection and program design are consistent with plans to conduct a rigorous national evaluation of the Promise Neighborhoods Program during the implementation phase and of specific solutions and strategies pursued by individual grantees. This commitment must include, but need not be limited to—

(a) Ensuring that the national evaluator has access to relevant program and project data sources (*e.g.,* administrative data and program and project indicator data) through memoranda of understanding with appropriate entities;

(b) Developing, in consultation with the national evaluator, an evaluation strategy, including identifying a credible comparison group; and

(c) Developing, in consultation with the national evaluator, a plan for identifying and collecting reliable and valid baseline data for both program participants and a designated comparison group of non-participants;

10. Identify and describe the academic and family and community support indicators that the applicant will use in conducting the needs assessment during the planning year. Applicants must—

(a) Collect data for the academic indicators listed in Table 1 and use them as both program and project indicators;

(b) Collect data for the family and community support indicators in Table 2 and use them as program indicators; and

(c) Collect data for unique family and community support indicators, developed by the applicant, that align with the goals and objectives of projects and use them as project indicators or use the indicators in Table 2 as project indicators.

TABLE 1—ACADEMIC INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE

Indicator	Result
—# and % of children birth to five years old who have a place where they usually go, other than an emergency room, when they are sick or in need of advice about their health.	Children enter kindergarten ready to learn.
—# and % of three-year-olds and children in kindergarten who demonstrate at the beginning of the program or school year age-appropriate functioning across multiple domains of early learning (as defined in this notice) as determined using developmentally-appropriate early learning measures (as defined in this notice).	
—# & % of children, from birth to kindergarten entry, participating in center-based or formal home-based early learning settings or programs, which may include Early Head Start, Head Start, child care, or publicly funded preschool.	
—# & % of students at or above grade level according to State mathematics and English language arts assessments in at least the grades required by the ESEA (3rd through 8th and once in high school).	Students are proficient in core academic subjects.
—Attendance rate of students in 6th, 7th, 8th, and 9th grade	Students successfully transition from middle grades to high school.
—Graduation rate (as defined in this notice)	Youth graduate from high school.
—# & % of Promise Neighborhood students who graduate with a regular high school diploma, as defined in 34 CFR 200.19(b)(1)(iv), and obtain postsecondary degrees, vocational certificates, or other industry-recognized certifications or credentials without the need for remediation.	High school graduates obtain a postsecondary degree, certification, or credential.

TABLE 2—FAMILY AND COMMUNITY SUPPORT INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE

Indicator	Result
—# & % of children who participate in at least 60 minutes of moderate to vigorous physical activity daily and consume five or more servings of fruits and vegetables daily; or	Students are healthy.
—possible second indicator, to be determined (TBD) by applicant.	
—# & % of students who feel safe at school and traveling to and from school, as measured by a school climate survey (as defined in this notice); or	Students feel safe at school and in their community.

TABLE 2—FAMILY AND COMMUNITY SUPPORT INDICATORS AND RESULTS THEY ARE INTENDED TO MEASURE—Continued

Indicator	Result
—possible second indicator, TBD by applicant.	
—Student mobility rate (as defined in this notice); or	Students live in stable communities.
—possible second indicator, TBD by applicant.	
—# & % of students who say they have a caring adult in their home, school, and community or # & % of family members who attend parent-teacher conferences; or	Families and community members support learning in Promise Neighborhood schools.
—possible second indicator TBD by applicant	
—# & % of students who have school and home access (and % of the day they have access) to broadband internet (as defined in this notice) and a connected computing device; or	Students have access to 21st century learning tools.
—possible second indicator TBD by applicant.	

Note: The indicators in Tables 1 and 2 are not intended to limit an applicant from collecting and using data for additional indicators. Examples of additional indicators are—

(i) The # and % of children who participate in high-quality learning activities during out-of-school hours;

(ii) The # and % of suspensions or discipline referrals during the year;

(iii) The share of housing stock in the geographically defined area that is rent-protected, publicly assisted, or targeted for redevelopment with local, State, or Federal funds;

(iv) The # and % of children who are homeless or in foster care and who have an assigned adult advocate; and

(v) The # and % of young children who are read to frequently by family members.

While the Department believes there are many programmatic benefits of collecting data on every child in the proposed neighborhood, if the applicant chooses to collect data on only a sample of the children in the neighborhood for some indicators, the applicant must describe in its application how a sample would be drawn that is representative of children in the neighborhood.

Absolute Priority 2: Promise Neighborhoods in Rural Communities

The Secretary establishes a priority for applicants proposing to develop plans for implementing a Promise Neighborhood that (1) meet all the requirements in Absolute Priority 1; and (2) serve one or more rural communities only.

Absolute Priority 3: Promise Neighborhoods in Tribal Communities

The Secretary establishes a priority for applications that (1) Meet all requirements in Absolute Priority 1; (2) serve one or more Indian tribes; and (3) are submitted by either an eligible entity that partners with an Indian Tribe (as defined in this notice), or by an Indian Tribe that meets the definition of an eligible entity.

Invitational Priority: Under this competition we are particularly interested in applications that address the following priority. For FY 2010, this priority is an invitational priority. Under 34 CFR 75.105(c)(1) we do not give an application that meets this invitational priority a competitive or absolute preference over other applications.

This priority is:

Invitational Priority: Unique Learning Needs, Quality Internet Connectivity, Civic Engagement, or Arts and Humanities

The Secretary establishes a priority for applicants proposing to develop plans that include one or more practices, strategies, or programs designed to—

1. Address the unique learning needs of students with disabilities or students with limited English proficiency. This may include activities designed to improve academic outcomes; close achievement gaps identified in section 1111(b)(3)(C)(xiii) of the ESEA between students with disabilities as compared to nondisabled students, and between students with limited English proficiency and their English proficient peers; and increase college- and career-readiness, including increasing high school graduation rates for students with disabilities or students with limited English proficiency;

2. Ensure that almost all students in the geographic area proposed to be served have broadband internet access (as defined in this notice) at home and at school, a connected computing device, and the knowledge and skills to use broadband internet access effectively and a connected computing device to support schoolwork;

3. Include meaningful civic engagement opportunities in the geographic area proposed to be served. Examples of these opportunities are efforts to increase the participation of residents, including children and youth, in decisions that affect their community and may improve school performance; efforts to use the perspectives of residents in shaping and evaluating programs; and positive youth development activities such as service-learning (as defined in 42 U.S.C. 12511) programs for students and families that address specific challenges in the neighborhood; or

4. Include opportunities for children and youth to experience and participate actively in the arts and humanities in their community so as to broaden, enrich, and enliven the educational, cultural, and civic experiences available in the neighborhood. Applicants may propose to develop plans for offering these activities in school and out-of-school settings and at any time during the calendar year.

Definitions: We are establishing these definitions for the FY 2010 grant competition only in accordance with section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1).

Academic programs means programs that include, but are not limited to—

(a) High-quality early learning programs designed to improve outcomes in multiple domains of early learning for young children. Such programs must be specifically intended to align standards, practices, strategies, or activities across as broad an age range as birth through third grade so as to ensure that young children enter kindergarten and the early elementary school grades demonstrating age-appropriate functioning across the multiple domains;

(b) For children in kindergarten through the 12th grade, programs, policies, and personnel that are linked to improved academic outcomes. The programs, policies, and personnel—

(i) Must include effective teachers and effective principals;

(ii) Must include strategies, practices, or programs that encourage and facilitate the evaluation, analysis, and use of student achievement, student growth, and other data by educators, families, and other stakeholders to inform decision-making;

(iii) Must include college and career-ready standards, assessments, and practices, including a well-rounded curriculum, instructional practices, strategies, or programs in, at a

minimum, core academic subjects as defined in section 9101(11) of the ESEA, that are aligned with high academic content and achievement standards and with high-quality assessments based on those standards; and

(iv) May include creating multiple pathways for students to earn regular high school diplomas (e.g., using schools that serve the needs of over-aged, under-credited, or other students with an exceptional need for flexibility regarding when they attend school or the additional supports they require; awarding credit based on demonstrated evidence of student competency; or offering dual-enrollment options).

(c) Programs that prepare students for college and career success, which may include programs that—

(i) Create and support partnerships with community colleges, four-year colleges, or universities and that help instill a college-going culture in the neighborhood;

(ii) Provide dual-enrollment opportunities for secondary students to gain college credit while in high school;

(iii) Provide, through relationships with businesses and other organizations, apprenticeship opportunities to students;

(iv) Align curricula in the core academic subjects with requirements for industry-recognized certifications or credentials, particularly in high-growth sectors; and

(v) Provide access to career and technical education programs so that individuals can attain the skills and industry-recognized certifications or credentials for success in their careers.

Broadband internet access means internet access sufficient to provide community members with the internet available when and where they need it and for the uses they require.

College-going culture means a local culture that includes an expectation that all students in the geographic area proposed to be served will have the academic preparation, financial resources, and other supports necessary to go to college or pursue other postsecondary training. That expectation is apparent in the attitudes, experiences, practices, beliefs, and values of individuals in the neighborhood.

Continuum of cradle-through-college-to-career solutions or *continuum of solutions* means solutions that—

(a) Include programs, policies, practices, services, systems, and supports that result in improving educational and developmental outcomes for children from cradle through college to career;

(b) Are based on the best available evidence, including, where available, strong or moderate evidence;

(c) Are linked and integrated seamlessly (as defined in this notice); and

(d) Include both academic programs and family and community supports.

Developmentally appropriate early learning measures means a range of assessment instruments that are used in ways consistent with the purposes for which they were designed and validated; appropriate for the ages and other characteristics of the children being assessed; designed and validated for use with children whose ages, cultures, languages spoken at home, socioeconomic status, abilities and disabilities, and other characteristics are similar to those of the children with whom the assessments will be used; and used in compliance with the measurement standards set forth by the American Educational Research Association (AERA), the American Psychological Association (APA), and the National Council for Measurement in Education (NCME) in the 1999 Standards for Educational and Psychological Testing.

Effective school means a school that has—

(a) Significantly closed the achievement gaps between subgroups of students (as identified in section 1111(b)(3)(C)(xiii) of the ESEA) within the school or district; or

(b)(i) Demonstrated success in significantly increasing student academic achievement in the school for all subgroups of students (as identified in section 1111(b)(3)(C)(xiii) of the ESEA) in the school; and

(ii) Made significant improvements in other areas, such as graduation rates (as defined in this notice) or recruitment and placement of effective teachers and effective principals.

Eligible entity means an entity that—

(a) Is representative of the geographic area proposed to be served (as defined in this notice);

(b) Is one of the following:

(i) A nonprofit organization that meets the definition of a nonprofit under 34 CFR 77.1(c), which may include a faith-based nonprofit organization; or

(ii) An institution of higher education as defined by section 101(a) of the Higher Education Act of 1965, as amended; and

(c) Currently provides at least one of the solutions from the applicant's proposed continuum of solutions in the geographic area proposed to be served.

Note: An eligible entity proposing to plan to "scale up" existing activities beyond the geographic area that the eligible entity is currently serving must partner with at least one organization or entity that provides at least one of the solutions from the applicant's proposed continuum of solutions in the geographic area proposed to be served.

Family and community supports means—

(a) Student health programs, such as mental health and physical health programs (*e.g.,* home visiting programs; Early Head Start; programs to improve nutrition and fitness, reduce childhood obesity, and create healthier communities);

(b) Safety programs, such as programs in school and out of school to prevent, control, and reduce crime, violence, drug and alcohol use, and gang activity; programs that address classroom and school-wide behavior and conduct, such as Positive Behavioral Interventions and Supports; programs to prevent child abuse and neglect; programs to prevent truancy and reduce and prevent bullying and harassment; and programs to improve the physical and emotional security of the school setting as perceived, experienced, and created by students, staff, and families;

(c) Community stability programs, such as programs that—

(i) Increase the stability of families in communities by expanding access to quality, affordable housing, providing legal support to help families secure clear legal title to their homes, and providing housing counseling or housing placement services;

(ii) Provide employment opportunities and training to improve job skills and readiness in order to decrease unemployment, with a goal of increasing family stability;

(iii) Improve families' awareness of, access to, and use of a range of social services, if possible at a single location;

(iv) Provide unbiased, outcome-focused, and comprehensive financial education, inside and outside the classroom and at every life stage;

(v) Increase access to traditional financial institutions (*e.g.,* banks and credit unions) rather than alternative financial institutions (*e.g.,* check cashers and payday lenders);

(vi) Help families increase their financial assets and savings; and

(vii) Help families access transportation to education and employment opportunities;

(d) Family and community engagement programs, such as family literacy programs and programs that provide training and opportunities for family members and other members of the community to support student learning and establish high expectations for academic achievement; mentorship

programs that create positive relationships between children and adults; and programs that provide for the use of such community resources as libraries, museums, and local businesses to support improved student academic outcomes; and

(e) 21st century learning tools, such as technology (*e.g.,* computers and mobile phones) used by students in the classroom and in the community to support their education. This includes programs that help students use the tools to develop knowledge and skills in such areas as reading and writing, mathematics, research, critical thinking, communication, creativity, innovation, and entrepreneurship.

Graduation rate means the four-year or extended-year adjusted cohort graduation rate as defined by 34 CFR 200.19(b)(1).

Note: This definition is not meant to prevent a grantee from also collecting information about the reasons why students do not graduate from the target high school, *e.g.,* dropping out or moving outside of the school district for non-academic or academic reasons.

Increased learning time means using a longer school day, week, or year to significantly increase the total number of school hours. It is used to redesign the school's program in a manner that includes additional time for (a) Instruction in core academic subjects as defined in section 9101 of the ESEA; (b) instruction in other subjects and enrichment activities that contribute to a well-rounded education, including, for example, physical education, service learning, and experiential and work-based learning opportunities that are provided by partnering, as appropriate, with other organizations; and (c) teachers to collaborate, plan, and engage in professional development within and across grades and subjects.

Indian Tribe means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe, 25 U.S.C. 479a and 479a–1.

Indicators of need means currently available data that describe—

(a) Academic need, which means—

(i) All or a portion of the neighborhood includes or is within the attendance zone of a low-performing school that is a high school, especially one in which the graduation rate (as defined in this notice) is less than 60 percent or a school that can be characterized as low-performing based on another proxy indicator, such as students' on-time progression from grade to grade; and

(ii) Other indicators, such as significant achievement gaps between subgroups of students (as identified in section 1111(b)(3)(C)(xiii) of the ESEA) within a school or LEA, high teacher and principal turnover, or high student absenteeism; and

(b) Family and community support need, which means—

(i) Percentages of children with preventable chronic health conditions (*e.g.,* asthma, poor nutrition, dental problems, obesity) or avoidable developmental delays;

(ii) Immunization rates;

(iii) Rates of crime, including violent crime;

(iv) Student mobility rates;

(v) Teenage birth rates;

(vi) Percentage of children in single-parent or no-parent families;

(vii) Rates of vacant or substandard homes, including distressed public and assisted housing; or

(viii) Percentage of the residents living at or below the Federal poverty threshold.

Linked and integrated seamlessly, with respect to the continuum of solutions, means solutions that have common outcomes, focus on similar milestones, support transitional time periods (*e.g.,* the beginning of kindergarten, the middle grades, or graduation from high school) along the cradle-through-college-to-career continuum, and address time and resource gaps that create obstacles for students in making academic progress.

Low-performing schools means schools receiving assistance through Title I that are in corrective action or restructuring in the State, as determined under section 1116 of the ESEA, and the secondary schools (both middle and high schools) in the State that are equally as low-achieving as these Title I schools and are eligible for, but do not receive, Title I funds.

Moderate evidence means evidence from previous studies with designs that can support causal conclusions (*i.e.,* studies with high internal validity) but have limited generalizability (*i.e.,* moderate external validity) or from studies with high external validity but moderate internal validity.

Multiple domains of early learning means physical well-being and motor development; social and emotional development; approaches to learning, which refers to the inclinations, dispositions, or styles, rather than skills, that reflect ways that children become involved in learning and develop their inclinations to pursue learning; language development, including emergent literacy; and cognition and general knowledge, which refers to thinking and problem-solving as well as knowledge about particular objects and the way the world works. Cognition and general knowledge include mathematical and scientific knowledge, abstract thought, and imagination.

Neighborhood assets means—

(a) Developmental assets that allow residents to attain the skills needed to be successful in all aspects of daily life (*e.g.,* educational institutions, early learning centers, and health resources);

(b) Commercial assets that are associated with production, employment, transactions, and sales (*e.g.,* labor force and retail establishments);

(c) Recreational assets that create value in a neighborhood beyond work and education (*e.g.,* parks, open space, community gardens, and arts organizations);

(d) Physical assets that are associated with the built environment and physical infrastructure (*e.g.,* housing, commercial buildings, and roads); and

(e) Social assets that establish well-functioning social interactions (*e.g.,* public safety and community engagement).

Persistently lowest-achieving school means, as determined by the State—

(a) Any school receiving assistance through Title I that is in improvement, corrective action, or restructuring and that—

(i) Is among the lowest-achieving five percent of Title I schools in improvement, corrective action, or restructuring or the lowest-achieving five Title I schools in improvement, corrective action, or restructuring in the State, whichever number of schools is greater; or

(ii) Is a high school that has had a graduation rate that is less than 60 percent over a number of years; and

(b) Any secondary school that is eligible for, but does not receive, Title I funds that—

(i) Is among the lowest-achieving five percent of secondary schools or the lowest-achieving five secondary schools in the State that are eligible for, but do not receive, Title I funds, whichever number of schools is greater; or

(ii) Is a high school that has had a graduation rate that is less than 60 percent over a number of years.

Program indicators are indicators that the Department will use only for research and evaluation purposes and for which an applicant is not required to propose solutions.

Project indicators are indicators for which an applicant proposes solutions intended to result in progress on the indicators.

Public officials means elected officials (*e.g.,* council members, aldermen and

women, commissioners, State legislators, Congressional representatives, members of the school board), appointed public officials (*e.g.,* members of a planning or zoning commission, or of any other regulatory or advisory board or commission), or individuals who are not necessarily public officials, but who have been appointed by a public official to serve on the Promise Neighborhoods governing board or advisory board.

Rapid-time, in reference to reporting and availability of locally-collected data, means that data are available quickly enough to inform current lessons, instruction, and related academic programs and family and community supports.

Representative of the geographic area proposed to be served means that residents of the geographic area proposed to be served have an active role in decision-making and that at least one-third of the eligible entity's governing board or advisory board is made up of—

(a) Residents who live in the geographic area proposed to be served;

(b) Residents of the city or county in which the neighborhood is located but who live outside the geographic area proposed to be served, and who are low-income (which means earning less than 80 percent of the area's median income as published by the Department of Housing and Urban Development);

(c) Public officials (as defined in this notice) who serve the geographic area proposed to be served (although not more than one-half of the governing board or advisory board may be made up of public officials); or

(d) Some combination of individuals from the three groups listed in paragraphs (a), (b), and (c) of this definition.

Rural community means a community that is served by an LEA that is currently eligible under the Small Rural School Achievement (SRSA) program or the Rural and Low-Income School (RLIS) program authorized under Title VI, Part B of the ESEA. Applicants may determine whether a particular LEA is eligible for these programs by referring to information on the following Department Web sites. For the SRSA program: *http://www.ed.gov/programs/reapsrsa/eligible09/index.html.*

For the RLIS program: *http://www.ed.gov/programs/reaprlisp/eligible09/index.html.*

School climate survey means an evaluation tool that measures the extent to which the school setting promotes or inhibits academic performance by collecting perception data from individuals, which could include students, staff, or families.

Segmentation analysis means the process of grouping and analyzing data from children and families in the geographic area proposed to be served according to indicators of need (as defined in this notice) or other relevant indicators.

Note: The analysis is intended to allow grantees to differentiate and more effectively target interventions based on what they learn about the needs of different populations in the geographic area.

Strong evidence means evidence from studies with designs that can support causal conclusions (*i.e.,* studies with high internal validity), and studies that, in total, include enough of the range of participants and settings to support scaling up to the State, regional, or national level (*i.e.,* studies with high external validity).

Student achievement means—

(a) For tested grades and subjects:

(i) A student's score on the State's assessments under the ESEA; and, as appropriate,

(ii) Other measures of student learning, such as those described in paragraph (b) of this definition, provided they are rigorous and comparable across classrooms.

(b) For non-tested grades and subjects: Alternative measures of student learning and performance, such as student scores on pre-tests and end-of-course tests; student performance on English language proficiency assessments; and other measures of student achievement that are rigorous and comparable across classrooms.

Student growth means the change in achievement data for an individual student between two or more points in time. Growth may also include other measures that are rigorous and comparable across classrooms.

Student mobility rate is calculated by dividing the total number of new student entries and withdrawals at a school, from the day after the first official enrollment number is collected through the end of the academic year, by the first official enrollment number of the academic year.

Note: This definition is not meant to limit a grantee from also collecting information about why students enter or withdraw from the school, *e.g.,* transferring to charter schools, moving outside of the school district for non-academic or academic reasons.

Theory of action means an organization's strategy regarding how, considering its capacity and resources, it will take the necessary steps and measures to accomplish its desired results.

Theory of change means an organization's beliefs about how its inputs, and early and intermediate outcomes, relate to accomplishing its long-term desired results.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities, definitions, requirements, and selection criteria. Section 437(d)(1) of GEPA, however, allows the Secretary to exempt from rulemaking requirements and regulations governing the first grant competition under a new or substantially revised program authority. This is the first grant competition for Promise Neighborhoods planning grants and, therefore, qualifies for this exemption. In order to ensure timely grant awards, the Secretary has decided to forgo public comment on the priorities, definitions, requirements, and selection criteria under section 437(d)(1) of GEPA. These priorities, definitions, requirements, and selection criteria will apply to the FY 2010 grant competition only.

Program Authority: 20 U.S.C. 7243–7243b.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 74, 75, 77, 79, 80, 81, 82, 84, 85, 86, 97, 98, and 99.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian tribes.

Note: The regulations in part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $10,000,000.

Estimated Range of Awards: $400,000–$500,000.

Estimated Average Size of Awards: $450,000.

Maximum Award: $500,000. The Department does not intend to award any grant with a budget exceeding $500,000.

Estimated Number of Awards: 20.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 12 months.

III. Eligibility Information

1. *Eligible Applicants:* An eligible applicant is an eligible entity (as defined in this notice) that operates a school or partners, in coordination with the school's LEA, with at least one school in the geographic area proposed to be served in which there are multiple

signs of distress based on indicators of need and other relevant indicators.

For purposes of Absolute Priority 3, an eligible applicant is an eligible entity that partners with an Indian Tribe, or is an Indian Tribe that meets the definition of an eligible entity. To be eligible under Absolute Priority 3, an applicant must also operate a school or partner, in coordination with the school's LEA, with at least one school in the geographic area proposed to be served. All eligible applicants may also partner with such entities as an LEA; Federal, State, and local government leaders; and providers of family and community supports. Partnering with such entities is strongly encouraged but is not required.

2. *Cost-Sharing or Matching:* To be eligible for an award, an applicant must demonstrate that it has established a commitment from one or more entities in the public or private sector, which may include philanthropic organizations, to provide financial assistance, and that the entities will provide matching funds for the planning process. An applicant must obtain matching funds, excluding other Federal funds, or in-kind donations for the planning process equal to at least 50 percent of its grant award, except that an applicant proposing a project that meets *Absolute Priority 2: Promise Neighborhoods in Rural Communities or Absolute Priority 3: Promise Neighborhoods in Tribal Communities* must obtain matching funds or in-kind donations equal to at least 25 percent of the grant award. Each applicant must demonstrate a commitment of matching funds in its application. In addition, the applicant must specify the source of the cost or contribution and in the case of a third-party in-kind contribution, a description of how the value was determined for the donated or contributed goods or service. Applicants must demonstrate the match commitment by including letters in their applications explaining the type and quantity of the match commitment, including original signatures from the executives of organizations or agencies providing the match. The Secretary may consider decreasing the matching requirement in the most exceptional circumstances, on a case-by-case basis. An applicant that is unable to meet the matching requirement must include in its application a request to the Secretary to reduce the matching level requirement, including the amount of the requested reduction and a statement of the basis for the request. An applicant should review the Department's cost-sharing and cost-matching regulations, which include specific limitations in 34 CFR 74.23 applicable to non-profit organizations and institutions of higher education and 34 CFR 80.24 applicable to State, local, and Indian tribal governments, and the Office of Management and Budget (OMB) cost principles for entity types regarding donations, capital assets, depreciations and allowable costs. These circulars are available on OMB's Web site at *http://www.whitehouse.gov/omb/circulars/index.html.*

IV. Application and Submission Information

1. *Address to Request Application Package:* Larkin Tackett, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W338, LBJ, Washington, DC 20202–5970. Telephone: (202) 453–6615 or by e-mail: *promiseneighborhoods@ed.gov.*

If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain a copy of the application package in an accessible format (*e.g.,* Braille, large print, audiotape, or computer diskette) by contacting the program contact person listed in this section.

2. *Content and Form of Application Submission:* Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this competition.

Notice of Intent to Apply: The Department will be able to develop a more efficient process for reviewing grant applications if it has a better understanding of the number of entities that intend to apply for funding under this competition. Therefore, the Secretary strongly encourages each potential applicant to notify the Department by completing and e-mailing the form on the Department's Web site. The Department may publish on the Department's Web site a list of applicants who submit an intent to apply. This e-mail notification should be sent to *pnintent@ed.gov* with "PN Intent to Apply" in the subject heading.

Applicants that fail to provide this e-mail notification may still apply for funding.

Page Limit: The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application.

You must limit the application narrative (Part III) to the equivalent of no more than 40 pages, using the following standards:

- A "page" is 8.5″ × 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- *Use one of the following fonts:* Times New Roman, Courier, Courier New, or Arial. An application submitted in any other font (including Times Roman or Arial Narrow) will not be accepted.

The page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the one-page abstract, the resumes, the memorandum of understanding, or the match commitment. However, the page limit does apply to all of the application narrative section (Part III).

3. *Submission Dates and Times:*

Applications Available: May 5, 2010.

Deadline for Notice of Intent to Apply: May 21, 2010.

Date of Pre-Application Webinars: Wednesday, May 5, 2010 and Monday, May 10, 2010. These pre-application webinars are designed to provide technical assistance to interested applicants for Promise Neighborhoods planning grants. Detailed information regarding the pre-application webinar times will be available through the Department of Education Web site at *http://www.ed.gov/programs/promiseneighborhoods/index.html.*

Deadline for Transmittal of Applications: June 25, 2010.

Applications for grants under this program must be submitted electronically using the Electronic Grant Application System (e-Application) accessible through the Department's e-Grants site. For information (including dates and times) about how to submit your application electronically, or in paper format by mail or hand delivery if you qualify for an exception to the electronic submission requirement, please refer to section IV. 7. *Other Submission Requirements* of this notice.

We do not consider an application that does not comply with the deadline requirements.

Individuals with disabilities who need an accommodation or auxiliary aid in connection with the application process should contact the person listed under **FOR FURTHER INFORMATION CONTACT** in section VII of this notice. If

the Department provides an accommodation or auxiliary aid to an individual with a disability in connection with the application process, the individual's application remains subject to all other requirements and limitations in this notice.

Deadline for Intergovernmental Review: August 24, 2010.

4. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

5. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

6. *Participation in a Community of Practice:* Grantees will be required to participate in, organize, or facilitate, as appropriate, communities of practice for Promise Neighborhoods. A community of practice is a group of grantees that agrees to interact regularly to solve a persistent problem or improve practice in an area that is important to them and the success of their project. Establishment of communities of practice under Promise Neighborhoods will enable grantees to meet, discuss, and collaborate with each other regarding grantee projects.

7. *Other Submission Requirements:*

Applications for grants under this program must be submitted electronically unless you qualify for an exception to this requirement in accordance with the instructions in this section.

a. *Electronic Submission of Applications.*

Applications for grants under the Promise Neighborhoods Program—CFDA Number 84.215P must be submitted electronically using e-Application, accessible through the Department's e-Grants Web site at: *http://e-grants.ed.gov.*

We will reject your application if you submit it in paper format unless, as described elsewhere in this section, you qualify for one of the exceptions to the electronic submission requirement *and* submit, no later than two weeks before the application deadline date, a written statement to the Department that you qualify for one of these exceptions. Further information regarding calculation of the date that is two weeks before the application deadline date is provided later in this section under *Exception to Electronic Submission Requirement.*

While completing your electronic application, you will be entering data online that will be saved into a database. You may not e-mail an electronic copy of a grant application to us.

Please note the following:

- You must complete the electronic submission of your grant application by 4:30:00 p.m., Washington, DC time, on the application deadline date. E-Application will not accept an application for this program after 4:30:00 p.m., Washington, DC time, on the application deadline date. Therefore, we strongly recommend that you do not wait until the application deadline date to begin the application process.
- The hours of operation of the e-Grants Web site are 6:00 a.m. Monday until 7:00 p.m. Wednesday; and 6:00 a.m. Thursday until 8:00 p.m. Sunday, Washington, DC time. Please note that, because of maintenance, the system is unavailable between 8:00 p.m. on Sundays and 6:00 a.m. on Mondays, and between 7:00 p.m. on Wednesdays and 6:00 a.m. on Thursdays, Washington, DC time. Any modifications to these hours are posted on the e-Grants Web site.
- You will not receive additional point value because you submit your application in electronic format, nor will we penalize you if you qualify for an exception to the electronic submission requirement, as described elsewhere in this section, and submit your application in paper format.
- You must submit all documents electronically, including all information you typically provide on the following forms: The Application for Federal Assistance (SF 424), the Department of Education Supplemental Information for SF 424, Budget Information—Non-Construction Programs (ED 524), and all necessary assurances and certifications. You must attach any narrative sections of your application as files in a .DOC (document), .RTF (rich text), or .PDF (Portable Document) format. If you upload a file type other than the three file types specified in this paragraph or submit a password protected file, we will not review that material.
- Your electronic application must comply with any page limit requirements described in this notice.
- Prior to submitting your electronic application, you may wish to print a copy of it for your records.
- After you electronically submit your application, you will receive an automatic acknowledgment that will include a PR/Award number (an identifying number unique to your application).
- Within three working days after submitting your electronic application, fax a signed copy of the SF 424 to the Application Control Center after following these steps:

(1) Print SF 424 from e-Application.

(2) The applicant's Authorizing Representative must sign this form.

(3) Place the PR/Award number in the upper right hand corner of the hard-copy signature page of the SF 424.

(4) Fax the signed SF 424 to the Application Control Center at (202) 245–6272.

- We may request that you provide us original signatures on other forms at a later date.

Application Deadline Date Extension in Case of e-Application Unavailability: If you are prevented from electronically submitting your application on the application deadline date because e-Application is unavailable, we will grant you an extension of one business day to enable you to transmit your application electronically, by mail, or by hand delivery. We will grant this extension if—

(1) You are a registered user of e-Application and you have initiated an electronic application for this competition; and

(2) (a) E-Application is unavailable for 60 minutes or more between the hours of 8:30 a.m. and 3:30 p.m., Washington, DC time, on the application deadline date; or

(b) E-Application is unavailable for any period of time between 3:30 p.m. and 4:30:00 p.m., Washington, DC time, on the application deadline date.

We must acknowledge and confirm these periods of unavailability before granting you an extension. To request this extension or to confirm our acknowledgment of any system unavailability, you may contact either (1) the person listed elsewhere in this notice under *For Further Information Contact* (*see* VII. Agency Contact) or (2) the e-Grants help desk at 1–888–336–8930. If e-Application is unavailable due to technical problems with the system and, therefore, the application deadline is extended, an e-mail will be sent to all registered users who have initiated an e-Application. Extensions referred to in this section apply only to the unavailability of e-Application.

Exception to Electronic Submission Requirement: You qualify for an exception to the electronic submission requirement, and may submit your application in paper format, if you are unable to submit an application through e-Application because—

- You do not have access to the Internet; or

• You do not have the capacity to upload large documents to e-Application; *and*

• No later than two weeks before the application deadline date (14 calendar days or, if the fourteenth calendar day before the application deadline date falls on a Federal holiday, the next business day following the Federal holiday), you mail or fax a written statement to the Department, explaining which of the two grounds for an exception prevents you from using the Internet to submit your application. If you mail your written statement to the Department, it must be postmarked no later than two weeks before the application deadline date. If you fax your written statement to the Department, we must receive the faxed statement no later than two weeks before the application deadline date.

Address and mail or fax your statement to: Larkin Tackett, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W338, Washington, DC 20202. Fax: (202) 401–4123.

Your paper application must be submitted in accordance with the mail or hand delivery instructions described in this notice.

b. *Submission of Paper Applications by Mail.*

If you qualify for an exception to the electronic submission requirement, you may mail (through the U.S. Postal Service or a commercial carrier) your application to the Department. You must mail the original and two copies of your application, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 215P), LBJ Basement Level 1, 400 Maryland Avenue, SW., Washington, DC 20202–4260.

You must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary of the U.S. Department of Education.

If you mail your application through the U.S. Postal Service, we do not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

If your application is postmarked after the application deadline date, we will not consider your application.

Note: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, you should check with your local post office.

c. *Submission of Paper Applications by Hand Delivery.*

If you qualify for an exception to the electronic submission requirement, you (or a courier service) may deliver your paper application to the Department by hand. You must deliver the original and two copies of your application, by hand, on or before the application deadline date, to the Department at the following address: U.S. Department of Education, Application Control Center, Attention: (CFDA Number 215P), 550 12th Street, SW., Room 7041, Potomac Center Plaza, Washington, DC 20202–4260.

The Application Control Center accepts hand deliveries daily between 8:00 a.m. and 4:30:00 p.m., Washington, DC time, except Saturdays, Sundays, and Federal holidays.

Note for Mail or Hand Delivery of Paper Applications: If you mail or hand deliver your application to the Department—

(1) You must indicate on the envelope and—if not provided by the Department—in Item 11 of the SF 424 the CFDA number, including suffix letter, if any, of the competition under which you are submitting your application; and

(2) The Application Control Center will mail to you a notification of receipt of your grant application. If you do not receive this grant notification within 15 business days from the application deadline date, you should call the U.S. Department of Education Application Control Center at (202) 245–6288.

V. Application Review Information

1. *Selection Criteria:* We are establishing selection criteria for the FY 2010 grant competition only in accordance with section 437(d)(1) of GEPA, 20 U.S.C. 1232(d)(1). For these selection criteria, we rely in large part on the criteria in 34 CFR 75.210, with some modifications to tailor the criteria to this program.

The maximum score for all the selection criteria is 100 points. The maximum score for each criterion is indicated in parentheses with the criterion. The selection criteria are as follows:

(1) Need for project (up to 10 points).

(a) The Secretary considers the need for the proposed project.

(b) In determining the need for the proposed project, the Secretary considers—

(i) The magnitude or severity of the problems to be addressed by the proposed project as described by indicators of need and other relevant indicators;

(ii) The extent to which the geographically defined area has been described; and

(iii) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities will be identified and addressed by the proposed project.

(2) Significance (up to 10 points).

(a) The Secretary considers the significance of the proposed project.

(b) In determining the significance of the proposed project, the Secretary considers—

(i) The likelihood that the proposed project will result in long-term systems change or improvement;

(ii) The extent to which the proposed project is likely to build local capacity to provide, improve, or expand services that address the needs of the target population;

(iii) The extent to which the proposed project involves the development or demonstration of promising new strategies that build on, or are alternatives to, existing strategies; and

(iv) The potential to sustain and apply the model of the proposed project or strategies, including, as appropriate, the potential for implementation of the model in a variety of settings.

(3) Quality of the project design (up to 20 points).

(a) The Secretary considers the quality of the design of the proposed project.

(b) In determining the quality of the design of the proposed project, the Secretary considers the following factors—

(i) The extent to which the applicant describes how it will plan to build a continuum of solutions designed to significantly improve the academic and family and community support indicators in this notice;

(ii) The extent to which the continuum of solutions includes a strategy, or a plan to develop a strategy, that will lead to significant improvements in one or more schools described in paragraph 2 of Absolute Priority 1;

(iii) The extent to which the applicant describes strategies for using data to manage program implementation, inform decision-making, engage stakeholders, and measure success;

(iv) The extent to which the applicant identifies and describes academic and family and community support indicators to be used for the needs assessment during the planning year;

(v) The extent to which the applicant demonstrates a commitment to work with the Department and with a

national evaluator for Promise Neighborhoods to ensure that data collection and program design are consistent with plans to conduct a rigorous national evaluation of the Promise Neighborhoods Program during the implementation phase and of specific solutions and strategies pursued by individual grantees; and

(vi) The extent to which the proposed project will be coordinated with similar or related efforts, and with other appropriate community, State, and Federal resources.

(4) Quality of project services (up to 15 points).

(a) The Secretary considers the quality of the services to be provided by the proposed project.

(b) In determining the quality of the project services, the Secretary considers—

(i) The extent to which the applicant describes proposed solutions to be provided by the proposed project that are based on the best available evidence including, where available, strong or moderate evidence;

(ii) The likelihood that the services to be provided by the proposed project will lead to improvements in the achievement of students as measured against rigorous academic standards; and

(iii) The extent to which the applicant explains how the needs assessment and segmentation analysis will be used to determine that children with the highest needs receive appropriate services to meet academic and developmental outcomes.

(5) Quality of project personnel (up to 25 points).

(a) The Secretary considers the quality of the project personnel who will carry out the proposed project.

(b) In determining the quality of the project personnel, the Secretary considers the qualifications, including relevant training and experience, of the applicant, including the project director, and the prior performance of the applicant on efforts similar or related to the proposed Promise Neighborhood.

(c) Relevant experience includes the applicant's experience in and lessons learned by—

(i) Working with the school or schools described in paragraph 2 of Absolute Priority 1;

(ii) Serving the neighborhood and its residents;

(iii) Collecting, analyzing, and using data for decision-making and ongoing improvement;

(iv) Creating formal and informal relationships, and generating community support to achieve results; and

(v) Securing and integrating funding streams from multiple public and private sources.

(6) Quality of the management plan (up to 20 points).

(a) The Secretary considers the quality of the management plan for the proposed project.

(b) In determining the quality of the management plan of the proposed project, the Secretary considers—

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks;

(ii) The extent to which the memorandum of understanding described in paragraph 5 of Absolute Priority 1 describes each partner's financial and programmatic commitment; how each partner's existing vision, theory of action, and theory of change, and existing activities align with those of the proposed Promise Neighborhood; and the governance structure of the proposed Promise Neighborhood;

(iii) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of families, school staff, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate; and

(iv) The potential for continued support of the project after Federal funding ends, including, as appropriate, the demonstrated commitment of appropriate entities to sustain and "scale up" the proposed Promise Neighborhood.

To facilitate the review of the application, the Department strongly recommends that applicants include a table of contents for their project narrative and address each of the selection criteria and priorities from Absolute Priority 1 in the order in which they are described in Table 3. After addressing the selection criteria, applicants may address the invitational priority included in the proposal to plan.

TABLE 3—RECOMMENDED ORGANIZATION OF PROJECT NARRATIVE

Selection criteria	Absolute priority one requirement
Need for project (up to 10 points)	1. Description of the neighborhood and level of distress.
Quality of project design (up to 20 points)	2. Description of how the applicant will plan to build the continuum;
Quality of project services (up to 15 points)	8. Description of how the applicant will plan to use data; 9. Description of commitment to work with national evaluator; and 10. Description of indicators to be used for needs assessment.
Quality of project personnel (up to 25 points)	3. Description of the applicant's organizational capacity to plan and implement a Promise Neighborhood.
Quality of management plan (up to 20 points)	4. Description of how the applicant will plan to sustain and "scale up" the proposed Promise Neighborhood; and 5. Description of commitment the applicant anticipates receiving from partners, including the preliminary memorandum of understanding described in paragraph 5(a).
Significance (up to 10 points)	6. Description of how the applicant will plan to track available sources and funding levels of Federal, State, and local funds that could be utilized in the project; and 7. Description of how the applicant will identify Federal, State, or local policies, regulations, or other requirements that would impede the applicant in achieving its goals.

Note: It may also be appropriate for an applicant to address a requirement under more than one selection criterion.

2. *Review and Selection Process:* The Department will screen applications submitted in accordance with the requirements in this notice, and will

determine which applications are eligible to be read based on whether they have met eligibility and other statutory and regulatory requirements.

For the grant reviews, the Department will use independent reviewers from various backgrounds and professions including: Pre-kindergarten–12 teachers and principals, college and university educators, researchers and evaluators, social entrepreneurs, strategy consultants, grant makers and managers, community development practitioners (in areas such as health or safety), and others with education expertise. The Department will thoroughly screen all reviewers for conflicts of interest to ensure a fair and competitive review process.

Reviewers will read, prepare a written evaluation, and score the applications assigned to their panel, using the selection criteria provided in this notice.

For applications addressing Absolute Priority 1, Absolute Priority 2, and Absolute Priority 3, the Secretary prepares a rank order of applications for each absolute priority based solely on the evaluation of their quality according to the selection criteria. In accordance with 34 CFR 75.217(d), the Secretary will make final awards after considering the rank ordering and other information including an applicant's performance and use of funds and compliance history under a previous award under any Department program. In making awards under any future competitions, the Secretary will consider an applicant's past performance.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN). We may notify you informally also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section in this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Reporting:* At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *http://www.ed.gov/fund/grant/apply/appforms/appforms.html.*

4. *Performance Measures:* The Secretary has established one performance indicator: The percentage of planning grantees that produce a high-quality plan as measured by their receiving at least 90 percent of the total possible points in the competition for FY 2011 implementation grants. All grantees will be required to submit a final performance report documenting their contribution in assisting the Department in measuring the performance of the program against this indicator, as well as other information requested by the Department.

VII. Agency Contact

For Further Information Contact: Larkin Tackett, U.S. Department of Education, 400 Maryland Avenue, SW., Room 4W338, Washington, DC 20202–5970. Telephone: (202) 453–6615 or by e-mail: *promiseneighborhoods@ed.gov.*

If you use a TDD, call the FRS, toll free, at 1–800–877–8339.

VIII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or computer diskette) on request to the program contact person listed under *For Further Information Contact* in section VII of this notice.

Electronic Access to This Document: You can view this document, as well as all other documents of this Department published in the **Federal Register,** in text or Adobe Portable Document Format (PDF) on the Internet at the following site: *http://www.ed.gov/news/fedregister.* To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

Note: The official version of this document is the document published in the **Federal Register.** Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at: *http://www.gpoaccess.gov/nara/index.html.*

Dated: April 29, 2010.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2010–10492 Filed 5–4–10; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Savannah River Site

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Savannah River Site. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Monday, May 24, 2010 1 p.m.–5 p.m. Tuesday, May 25, 2010 8:30 a.m.–4:30 p.m.

ADDRESSES: The Mulberry Inn, 601 East Bay Street, Savannah, Georgia 31401.

FOR FURTHER INFORMATION CONTACT: Gerri Flemming, Office of External Affairs, Department of Energy, Savannah River Operations Office, P.O. Box A, Aiken, SC 29802; Phone: (803) 952–7886.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

Monday, May 24, 2010

1 p.m. Combined Committee Session.
5 p.m. Adjourn.

Tuesday, May 25, 2010

8:30 a.m. Approval of Minutes, Agency Updates, Public Comment Session, Chair and Facilitator Updates, Waste Management Committee Report, Public Comment Session.
12 p.m. Lunch Break.
1 p.m. Nuclear Materials Committee Report, Strategic and Legacy Management Committee Report, Facility Disposition and Site Remediation Committee Report, Administrative Committee Report, Public Comment Session.
4:30 p.m. Adjourn.

If needed, time will be allotted after public comments for items added to the agenda and administrative details. A final agenda will be available at the meeting on Monday, May 24, 2010.

Public Participation: The EM SSAB, Savannah River Site, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special

needs. If you require special accommodations due to a disability, please contact Gerri Flemming at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Gerri Flemming's office at the address or telephone listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Gerri Flemming at the address or phone number listed above. Minutes will also be available at the following Web site: *http://www.srs.gov/general/outreach/srs-cab/srs-cab.html.*

Issued at Washington, DC, on April 29, 2010.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2010–10513 Filed 5–4–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Idaho National Laboratory

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Idaho National Laboratory. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, May 12, 2010, 8 a.m.–5 p.m.

Opportunities for public participation will be from 1:30 p.m. to 1:45 p.m. and from 3:30 p.m. to 3:45 p.m.

These times are subject to change; please contact the Federal Coordinator (below) for confirmation of times prior to the meeting.

ADDRESSES: Hilton Garden Inn, 700 Lindsay Boulevard, Idaho Falls, Idaho 83402.

FOR FURTHER INFORMATION CONTACT: Robert L. Pence, Federal Coordinator, Department of Energy, Idaho Operations Office, 1955 Fremont Avenue, MS–1203, Idaho Falls, ID 83415. Phone (208) 526–6518; Fax (208) 526–8789 or e-mail: *pencerl@id.doe.gov* or visit the Board's Internet home page at: *http://www.inlemcab.org.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Topics (agenda topics may change up to the day of the meeting; please contact Robert L. Pence for the most current agenda):

- Progress to Cleanup
- Idaho National Laboratory Site Wide Review—CERCLA Long-Term Ecological Program
- Sodium Bearing Waste Integrated Waste Treatment Unit Construction—Operational Readiness Plans
- Decommission and Demolition Status Update
- DOE-Idaho White Paper on Spent Fuel and High-Level Waste
- Multi-Purpose Haul Road
- Advanced Mixed Waste Treatment Plant Extension Modification Statement of Work

Public Participation: The EM SSAB, Idaho National Laboratory, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Robert L. Pence at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral presentations pertaining to agenda items should contact Robert L. Pence at the address or telephone number listed above. The request must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments. This notice is being published less than 15 days prior to the meeting date due to programmatic issues that had to be resolved prior to the meeting date.

Minutes: Minutes will be available by writing or calling Robert L. Pence, Federal Coordinator, at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.inlemcab.org/meetings.html.*

Issued at Washington, DC, on April 29, 2010.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2010–10514 Filed 5–4–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Oak Ridge Reservation. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, May 12, 2010, 6 p.m.

ADDRESSES: DOE Information Center, 475 Oak Ridge Turnpike, Oak Ridge, Tennessee.

FOR FURTHER INFORMATION CONTACT: Patricia J. Halsey, Federal Coordinator, Department of Energy Oak Ridge Operations Office, P.O. Box 2001, EM–90, Oak Ridge, TN 37831. Phone (865) 576–4025; Fax (865) 576–2347 or e-mail: *halseypj@oro.doe.gov* or check the Web site at *http://www.oakridge.doe.gov/em/ssab.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda: The main meeting presentation will be Cumulative Aspects of Waste Processors In and Around the DOE Oak Ridge Reservation.

Public Participation: The EM SSAB, Oak Ridge, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Patricia J. Halsey at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make

oral statements pertaining to the agenda item should contact Patricia J. Halsey at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Patricia J. Halsey at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.oakridge.doe.gov/em/ssab/minutes.htm.*

Issued at Washington, DC, on April 29, 2010.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2010–10515 Filed 5–4–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Paducah

AGENCY: Department of Energy (DOE).

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Paducah. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, May 20, 2010, 6 p.m.

ADDRESSES: Barkley Centre, 111 Memorial Drive, Paducah, Kentucky 42001.

FOR FURTHER INFORMATION CONTACT: Reinhard Knerr, Deputy Designated Federal Officer, Department of Energy Paducah Site Office, Post Office Box 1410, MS–103, Paducah, Kentucky 42001, (270) 441–6825.

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management and related activities.

Tentative Agenda

- Call to Order, Introductions, Review of Agenda.
- Deputy Designated Federal Officer's Comments.
- Federal Coordinator's Comments.
- Liaisons' Comments.
- Subcommittee Chairs' Comments.
- Presentations.
- Administrative Issues.
- Public Comments.
- Final Comments.
- Adjourn.

Breaks Taken as Appropriate.

Public Participation: The EM SSAB, Paducah, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Reinhard Knerr at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Reinhard Knerr at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Reinhard Knerr at the address and phone number listed above. Minutes will also be available at the following Web site: *http://www.pgdpcab.org/meetings.html.*

Issued at Washington, DC, on April 29, 2010.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2010–10518 Filed 5–4–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a retreat and meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico. The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Wednesday, May 12, 2010, 9 a.m.–5 p.m. Thursday, May 13, 2010, 9 a.m.–4:30 p.m.

ADDRESSES: Ohkay Owingeh Conference Center, North Taos Highway 68, San Juan Pueblo, New Mexico 87566.

FOR FURTHER INFORMATION CONTACT: Menice Santistevan, Northern New Mexico Citizens' Advisory Board (NNMCAB), 1660 Old Pecos Trail, Suite B, Santa Fe, NM 87505. Phone (505) 995–0393; Fax (505) 989–1752 or E-mail: *msantistevan@doeal.gov.*

SUPPLEMENTARY INFORMATION: *Purpose of the Board:* The purpose of the Board is to make recommendations to DOE–EM in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

Retreat—Wednesday, May 12, 2010

9 a.m. Welcome and Introductions, Lori Isenberg
9:15 a.m. Welcome by Governor Marcelino Aguino, Ohkay Owingeh
9:30 a.m. New Mexico Environment Department (NMED), James Bearzi
- Status of Consent Order
- NMED Issues of Concern
- RCRA Permit Renewal
- Top Three Issues

10:30 a.m. Break
10:45 a.m. Environmental Protection Agency (EPA), Rich Mayer
- Federal Facilities Compliance Act
- National Pollutant Discharge Elimination System Permit
- Waste Isolation Pilot Plant
- Other EPA Regulatory Activities at Los Alamos National Laboratory

11:45 a.m. Lunch Break
1 p.m. DOE, Los Alamos Site Office (LASO), George J. Rael
- Organizational Chart for LASO and Los Alamos National Security
- Top Three Priorities
- EM Baseline
- Funding Issues
- Impacts of Delayed Funding

2 p.m. LANL Consent Order, Michael Graham
- LANL EM Program Master Plan
- Progress in Clean-up
- Future Activities
- LANL Issues of Concern
- Top Three Issues

3 p.m. Break
3:30 p.m. NNMCAB Communications, Lorelei Novak
- Web Site Training
- Speaker's Bureau Information
- Distribution of Information to Members

4:30 p.m. Wrap-up Discussion, Lori Isenberg
5 p.m. Adjourn

Meeting—Thursday, May 13, 2010

9 a.m. Call to Order by Co-Deputy Designated Federal Officers (DDFOs), Ed Worth and Lee Bishop
Establishment of a Quorum, Lorelei Novak
- Roll Call
- Excused Absences

Welcome and Introductions, Ralph Phelps
Approval of Agenda
Approval of March 31, 2010 Meeting Minutes
9:15 a.m. Public Comment Period
9:30 a.m. Open Forum for NNMCAB Members
10 a.m. Old Business
- Written reports
- Other items

10:30 a.m. Break
10:45 a.m. New Business
11 a.m. Co-DDFO Report
11:15 a.m. Consideration and Action on Recommendation(s)
12 p.m. Lunch Break
1 p.m. Presentation on Disposal Authority Statement (DAS) and Performance Assessment and Composite Analysis (PA/CA)
3 p.m. Break
3:15 p.m. Continue DAS and PA/CA Presentation
4 p.m. Public Comment Period
4:15 p.m. Wrap-up Discussion, Lori Isenberg
4:30 p.m. Adjourn

Public Participation: The EM SSAB, Northern New Mexico, welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Menice Santistevan at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Santistevan at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Menice Santistevan at the address or phone number listed above. Minutes and other Board documents are on the Internet at: *http://www.nnmcab.org/*.

Issued at Washington, DC, on April 29, 2010.

Carol A. Matthews,

Committee Management Officer.

[FR Doc. 2010–10516 Filed 5–4–10; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

April 28, 2010.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER00–1053–022; ER09–1305–001.

Applicants: Maine Public Service Company.

Description: Maine Public Service Company submits the revised Open Access Transmission Tariff pages and a Settlement Agreement re the Formula Rate and 2009 Informational Filing.

Filed Date: 04/27/2010.

Accession Number: 20100428–0201.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 18, 2010.

Docket Numbers: ER06–733–007.

Applicants: Midland Cogeneration Venture Limited Partnership.

Description: Midland Cogeneration Venture Limited Partnership Supplement to Notice of Non-Material Change in Status.

Filed Date: 04/27/2010.

Accession Number: 20100427–5169.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 18, 2010.

Docket Numbers: ER10–956–001.

Applicants: Vantage Wind Energy LLC.

Description: Vantage Wind Energy LLC submits supplement to the market-based rate application it filed with the FERC on 3/30/10.

Filed Date: 04/27/2010.

Accession Number: 20100427–0217.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 18, 2010.

Docket Numbers: ER10–982–002.

Applicants: New York Independent System Operator, Inc.

Description: ISO New York Independent System Operator submits additional formatting changes.

Filed Date: 04/27/2010.

Accession Number: 20100427–0213.

Comment Date: 5 p.m. Eastern Time on Friday, May 7, 2010.

Docket Numbers: ER10–1005–002.

Applicants: New York Independent System Operator, Inc.

Description: New York Independent System Operator, Inc submits an errata to its 4/2/10 filing under ER10–1005.

Filed Date: 04/27/2010.

Accession Number: 20100427–0214.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 18, 2010.

Docket Numbers: ER10–1103–000.

Applicants: AmerenEnergy Medina Valley Cogen, L.L.C.

Description: AmerenEnergy Medina Valley Cogen, L.L.C. submits tariff filing per 35.12: Baseline—AmerenEnergy Medina Valley Tariff to be effective 4/28/2010.

Filed Date: 04/27/2010.

Accession Number: 20100427–5119.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 18, 2010.

Docket Numbers: ER10–1104–000.

Applicants: Mint Energy, LLC.

Description: Mint Energy, LLC submits tariff filing per 35.12: Rate Schedule FERC No.1 to be effective 6/26/2010.

Filed Date: 04/27/2010.

Accession Number: 20100427–5125.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 18, 2010.

Docket Numbers: ER10–1105–000.

Applicants: Pacific Gas and Electric Company.

Description: Pacific Gas and Electric Company submits tariff filing per 35.12: Baseline Filing of PG&E's TO Tariff to be effective 4/27/2010.

Filed Date: 04/27/2010.

Accession Number: 20100427–5129.

Comment Date: 5 p.m. Eastern Time on Tuesday, May 18, 2010.

Docket Numbers: ER10–1106–000.

Applicants: Pacific Gas and Electric Company.

Description: Pacific Gas and Electric Company submits tariff filing per 35.12: Baseline Filing for its Grid Management Charge Pass-Through Tariff, FERC Electric Tariff, Volume 11, to be effective 4/28/2010.

Filed Date: 04/28/2010.

Accession Number: 20100428–5005.

Comment Date: 5 p.m. Eastern Time on Wednesday, May 19, 2010.

Docket Numbers: ER10–1107–000.

Applicants: Pacific Gas and Electric Company.

Description: Pacific Gas and Electric Company submits tariff filing per 35: Compliance Baseline Filing of its Market-Based Rate Tariff, FERC Electric Tariff, Volume 13, to be effective 4/28/2010.

Filed Date: 04/28/2010.

Accession Number: 20100428–5007.

Comment Date: 5 p.m. Eastern Time on Wednesday, May 19, 2010.

Docket Numbers: ER10–1108–000.
Applicants: Affordable Power, L.P.
Description: Affordable Power, L.P. submits Notice of Cancellation of its market-based rate tariff, Rate Schedule FERC 1.
Filed Date: 04/27/2010.
Accession Number: 20100428–0204.
Comment Date: 5 p.m. Eastern Time on Tuesday, May 18, 2010.

Docket Numbers: ER10–1109–000.
Applicants: Eagle Creek Hydro Power, LLC.
Description: Eagle Creek Hydro Power, LLC submits Application for market-based rate authority request for waivers and pre-approvals, and request for finding of qualification as Category 1.
Filed Date: 04/27/2010.
Accession Number: 20100428–0203.
Comment Date: 5 p.m. Eastern Time on Tuesday, May 18, 2010.

Docket Numbers: ER10–1110–000.
Applicants: Mint Energy, LLC.
Description: Mint Energy, LLC submits tariff filing per 35.12: Rate Schedule FERC No. 1 to be effective 6/26/2010.
Filed Date: 04/28/2010.
Accession Number: 20100428–5012.
Comment Date: 5 p.m. Eastern Time on Wednesday, May 19, 2010.

Docket Numbers: ER10–1111–000.
Applicants: American Electric Power Service Corporation.
Description: AEP Texas Central Company submits an amended and restated transmission interconnection agreement, etc.
Filed Date: 04/28/2010.
Accession Number: 20100428–0207.
Comment Date: 5 p.m. Eastern Time on Wednesday, May 19, 2010.

Docket Numbers: ER10–1112–000.
Applicants: Southern California Edison Company.
Description: Southern California Edison Company submits Standard Large Generator Interconnection Agreement among Alta Windpower Development, LLC *et al.*
Filed Date: 04/28/2010.
Accession Number: 20100428–0210.
Comment Date: 5 p.m. Eastern Time on Wednesday, May 19, 2010.

Docket Numbers: ER10–1113–000.
Applicants: Pacific Gas and Electric Company.
Description: Pacific Gas and Electric Company submits tariff filing per 35.12: Baseline Filing of PG&E's WD Tariff to be effective 4/28/2010.
Filed Date: 04/28/2010.
Accession Number: 20100428–5110.
Comment Date: 5 p.m. Eastern Time on Wednesday, May 19, 2010.

Any person desiring to intervene or to protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5 p.m. Eastern time on the specified comment date. It is not necessary to separately intervene again in a subdocket related to a compliance filing if you have previously intervened in the same docket. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St., NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive e-mail notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please e-mail *FERCOnlineSupport@ferc.gov* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2010–10503 Filed 5–4–10; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2003–0004; FRL–8821–5]

Access to Confidential Business Information by Guident Technologies Inc.'s Identified Subcontractor

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has authorized a subcontractor of its prime contractor, Guident Technologies Inc. of [Herndon, VA, to access information which has been submitted to EPA under all sections of the Toxic Substances Control Act (TSCA). Some of the information may be claimed or determined to be Confidential Business Information (CBI).

DATES: Access to the confidential data will occur no sooner than May 12, 2010.

FOR FURTHER INFORMATION CONTACT: *For general information contact*: Colby Lintner, Regulatory Coordinator, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 554–1404; e-mail address: *TSCA-Hotline@epa.gov*.

For technical information contact: Scott Sherlock, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (202) 564–8257; fax number: (202) 564–8251; e-mail address: *sherlock.scott@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Notice Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to all who manufacture, process or distribute industrial chemicals. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of this Document and Other Related Information?

Docket. EPA has established a docket for this action under docket identification (ID) number EPA–HQ–OPPT–2003–0004. All documents in the

docket are listed in the docket index available at *http://www.regulations.gov*. Although, listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available electronically at *http://www.regulations.gov*, or, if only available in hard copy, at the OPPT Docket. The OPPT Docket is located in the EPA Docket Center (EPA/DC) at Rm. 3334, EPA West Bldg., 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation are 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The telephone number of the EPA/DC Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Docket visitors are required to show photographic identification, pass through a metal detector, and sign the EPA visitor log. All visitor bags are processed through an X-ray machine and subject to search. Visitors will be provided an EPA/DC badge that must be visible at all times in the building and returned upon departure.

II. What Action Is the Agency Taking?

Under Contract Number GS–35F–0799M, Order Number EP09D000603, contractor Guident Technologies Inc. of 198 Van Buren Street, Suite 120, Herndon, VA and subcontractor Logistics Management Institute of 2000 Corporate Ridge, McLean, VA will assist the Office of Pollution Prevention and Toxics (OPPT) in performing development, maintenance, and operations for the Confidential Business Information Systems and for Test Confidential Business Information Tracking Systems (CBITS) and (TCBITS).

In accordance with 40 CFR 2.306(j), EPA has determined that under Contract Number GS—35F–0799M, Order Number EP09D000603, Guident Technologies Inc. and its subcontractor will require access to CBI submitted to EPA under all sections of TSCA to perform successfully the duties specified under the contract. Guident Technologies Inc. and its subcontractor's personnel will be given access to information submitted to EPA under all sections of TSCA.

EPA is issuing this notice to inform all submitters of information under all sections of TSCA that EPA may provide Guident Technologies Inc. and its subcontractor access to these CBI materials on a need-to-know basis only. All access to TSCA CBI under this contract will take place at EPA Headquarters in accordance with EPA's TSCA CBI Protection Manual.

Access to TSCA data, including CBI, will continue until September 1, 2010. If the contract is extended, this access will also continue for the duration of the extended contract without further notice.

Guident Technologies Inc. and its subcontractor's personnel will be required to sign nondisclosure agreements and will be briefed on appropriate security procedures before they are permitted access to TSCA CBI.

List of Subjects

Environmental protection, Confidential Business Information.

Dated: March 8, 2010.

Matthew Leopard,

Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2010–10230 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2009–0410; FRL–9145–3]

Agency Information Collection Activities; Submission to OMB for Review and Approval; Comment Request; NSPS for Pressure Sensitive Tape and Label Surface Coating Operations (Renewal), EPA ICR Number 0658.10, OMB Control Number 2060–0004

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that an Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval. This is a request to renew an existing approved collection. The ICR which is abstracted below describes the nature of the collection and the estimated burden and cost.

DATES: Additional comments may be submitted on or before June 4, 2010.

ADDRESSES: Submit your comments, referencing docket ID number EPA–HQ–OECA–2009–0410, to (1) EPA online using *http://www.regulations.gov* (our preferred method), or by e-mail to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center (EPA/DC), Environmental Protection Agency, Enforcement and Compliance Docket and Information Center, mail code 28221T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460, and (2) OMB at: Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: John Schaefer, Office of Air Quality Planning and Standards, Sector Policies and Programs Division (D243–05), Measurement Policy Group, Environmental Protection Agency, Research Triangle Park, North Carolina, 27711; telephone number: (919) 541–0296; fax number: (919) 541–3207; e-mail address: *schaefer.john@epa.gov.*

SUPPLEMENTARY INFORMATION: EPA has submitted the following ICR to OMB for review and approval according to the procedures prescribed in 5 CFR 1320.12. On July 8, 2009 (74 *FR* 32580), EPA sought comments on this ICR pursuant to 5 CFR 1320.8(d). EPA received no comments. Any additional comments on this ICR should be submitted to EPA and OMB within 30 days of this notice.

EPA has established a public docket for this ICR under docket ID number EPA–HQ–OECA–2009–0410, which is available for public viewing online at *http://www.regulations.gov,* in person viewing at the Enforcement and Compliance Docket in the EPA Docket Center (EPA/DC), EPA West, Room 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566–1752.

Use EPA's electronic docket and comment system at *http://www.regulations.gov,* to submit or view public comments, access the index listing of the contents of the docket, and to access those documents in the docket that are available electronically. Once in the system, select "docket search," then key in the docket ID number identified above. Please note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing at *http://www.regulations.gov,* as EPA receives them and without change, unless the comment contains copyrighted material, Confidential Business Information (CBI), or other information whose public disclosure is restricted by statute. For further information about the electronic docket, go to *http://www.regulations.gov.*

Title: NSPS for Pressure Sensitive Tape and Label Surface Coating Operations (Renewal).

ICR Numbers: EPA ICR Number 0658.10, OMB Control Number 2060–0004.

ICR Status: This ICR is scheduled to expire on May 31, 2010. Under OMB regulations, the Agency may continue to conduct or sponsor the collection of information while this submission is pending at OMB. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the CFR, after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, and displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers in certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This Information Collection Request (ICR) renewal is being submitted for the NSPS for Pressure Sensitive Tape and Label Surface Coating Operations (40 CFR part 60, subpart RR), which were promulgated on October 18, 1983. These regulations apply to each coating line used in the manufacture of pressure sensitive tape and label materials, and on which construction or reconstruction commenced after the proposal date. Facilities that input 45 megagrams of volatile organic compounds (VOC) or less per 12 month period are not subject to the emission limit established by the subpart. The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60 subpart A and any changes, or additions to the Provisions specified at 40 CFR part 60, subpart RR.

Burden Statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 25.21 hours per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Owners or operators of pressure sensitive tape and label surface coating operations.

Estimated Number of Respondents: 37.

Frequency of Response: Initially, occasionally, and semiannually.

Estimated Total Annual Hour Burden: 3,353.

Estimated Total Annual Cost: $387,141 which includes $315,341 in labor costs, $7,000 in capital/startup costs, and $64,800 in operation and maintenance (O&M) costs.

Changes in the Estimates: There is no change in the labor hours or cost to the respondents in this ICR compared to the previous ICR because the regulations have not changed over the past three years and are not anticipated to change over the next three years. Since this ICR renewal was approved to be processed under the "Expedited Approach" option, EPA has maintained the same estimate for the number of sources currently subject to this standard as indicated in the most recently approved ICR. Therefore, the labor hours figures in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR.

Dated: April 29, 2010.

John Moses,

Director, Collection Strategies Division.

[FR Doc. 2010–10532 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0281; FRL–8821–1]

Agency Information Collection Activities; Proposed Collection; Comment Request; Plant-Incorporated Protectants; CBI Substantiation and Adverse Effects Reporting; EPA ICR No. 1693.06, OMB Control No. 2070–0142

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). This ICR, entitled: "Plant-Incorporated Protectants; CBI Substantiation and Adverse Effects Reporting" and identified by EPA ICR No. 1693.06 and OMB Control No. 2070–0142, is scheduled to expire on January 31, 2011. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the proposed information collection.

DATES: Comments must be received on or before July 6, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0281, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2010–0281. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your

comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Scott Drewes, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 347–0107; fax number: (703) 305–5884; e-mail address: *drewes.scott@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. What Information Is EPA Particularly Interested in?

Pursuant to section 3506(c)(2)(A) of PRA, EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.

2. Evaluate the accuracy of the Agency's estimates of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.

3. Enhance the quality, utility, and clarity of the information to be collected.

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What Should I Consider when I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.

2. Describe any assumptions that you used.

3. Provide copies of any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.

5. Provide specific examples to illustrate your concerns.

6. Offer alternative ways to improve the collection activity.

7. Make sure to submit your comments by the deadline identified under **DATES**.

8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

III. What Information Collection Activity or ICR Does This Action Apply to?

Affected entities: Entities potentially affected by this ICR include producers and importers of plant-incorporated protectants (PIPs). The North American Industrial Classification System (NAICS) codes for respondents under this ICR include: Pesticide and other agricultural chemical manufacturing (NAICS code 325320), biological products (except diagnostic) manufacturing (NAICS code 325414), farm supplies wholesalers (NAICS code 422910), flower, nursery stock, and florists's suppliers (NAICS code 422930), research and development in the physical, engineering, and life sciences (NAICS code 541710), and colleges, universities, and professional schools (NAICS code 611310).

Title: Plant-Incorporated Protectants; CBI Substantiation and Adverse Effects Reporting.

ICR numbers: EPA ICR No. 1693.06, OMB Control No. 2070–0142.

ICR status: This ICR is currently scheduled to expire on January 31, 2011. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: This ICR addresses the two information collection requirements described in regulations pertaining to pesticidal substances that are produced by plants (PIPs) and which are codified in 40 CFR part 174. A PIP is defined as "the pesticidal substance that is intended to be produced and used in a living plant and the genetic material necessary for the production of such a substance." Many, but not all, PIPs are exempt from registration requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Registrants sometimes include in a submission to EPA for registration of a PIP information that they claim to be CBI. CBI is protected by FIFRA and generally cannot be released to the public. Under 40 CFR part 174, whenever a registrant claims that information submitted to EPA in support of a registration application for PIPs contains CBI, the registrant must substantiate such claims when they are made, rather than provide it later upon request by EPA. In addition, manufacturers of PIPs that are otherwise exempted from the requirements of registration must report adverse effects of the PIP to the Agency. Such reporting will allow the Agency to determine whether further action is needed to prevent unreasonable adverse effects to the environment. Submission of this information is mandatory.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to average 7 hours for an adverse effects report and 21.5 hours for substantiation of a CBI claim, per response. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the

existing ways to comply with any previously applicable instructions and requirements which have subsequently changed; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

The ICR provides a detailed explanation of this estimate, which is only briefly summarized here:

Estimated total number of potential respondents: 18.

Frequency of response: On occasion.

Estimated total average number of responses for each respondent: One for each registration application, experimental use permit, or reporting of adverse effects.

Estimated total annual burden hours: 389 hours.

Estimated total annual costs: $26,875.00. This includes an annual cost of $26,721 for CBI substantiations and $154 for adverse effects reporting.

IV. Are There Changes in the Estimates From the Last Approval?

There is an increase of 86 hours in the total estimated respondent burden compared with that identified in the ICR currently approved by OMB. This increase reflects an increase in the number of PIP applications during the last 2 years. EPA expects that this higher level of activity will continue. This change is an adjustment.

V. What Is the Next Step in the Process for This ICR?

EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** notice pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Reporting and recordkeeping requirements.

Dated: April 27, 2010.

Stephen A. Owens,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2010–10413 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9145–1]

Meeting of the Ozone Transport Commission

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: The United States Environmental Protection Agency is announcing the 2010 Annual Meeting of the Ozone Transport Commission (OTC). This OTC meeting will explore options available for reducing ground-level ozone precursors in a multi-pollutant context. The Commission will be evaluating potential measures and considering actions in areas such as performance standards for electric generating units (EGUs) on high electric demand days, oil and gas boilers serving EGUs, small natural gas boilers, stationary generators, energy security/energy efficiency, architectural industrial and maintenance coatings, consumer products, industrial commercial and institutional (ICI) boilers, vapor recovery at gas stations, large above ground storage tanks, seaports, aftermarket catalysts, lightering, and non-road idling.

DATES: The meeting will be held on June 3, 2010 starting at 9 a.m. and ending at 4 p.m.

Location: Tremont Plaza Hotel, 222 St. Paul Place, Baltimore, Maryland 21202; (410) 727–4222 or (800) 873–6668.

FOR FURTHER INFORMATION CONTACT:

For documents and press inquiries contact: Ozone Transport Commission, 444 North Capitol Street, NW., Suite 638, Washington, DC 20001; (202) 508–3840; e-mail: *ozone@otcair.org;* Web site: *http://www.otcair.org.*

SUPPLEMENTARY INFORMATION: The Clean Air Act Amendments of 1990 contain at section 184 provisions for the Control of Interstate Ozone Air Pollution. Section 184(a) establishes an Ozone Transport Region (OTR) comprised of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, parts of Virginia and the District of Columbia. The purpose of the OTC is to deal with ground-level ozone formation, transport, and control within the OTR.

Type of Meeting: Open.

Agenda: Copies of the final agenda will be available from the OTC office (202) 508–3840; by e-mail: *ozone@otcair.org* or via the OTC Web site at *http://www.otcair.org.*

Dated: April 28, 2010.

Abraham Ferdes,

Acting Regional Administrator, Region III.

[FR Doc. 2010–10536 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0274; FRL–8820–7]

Notice of Receipt of a Pesticide Petition Requesting a Temporary Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the Agency's receipt of an initial filing of a pesticide petition requesting a temporary tolerance exemption from the requirement of a tolerance for *E. coli* 0157:H7 specific bacteriophages used on food-contact surfaces in food processing plants.

DATES: Comments must be received on or before June 4, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0274 and the pesticide petition number 9G7585, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2010–0274 and the pesticide petition number 9G7585. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information

whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT:

SanYvette Williams, Antimicrobials Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 305–7702; e-mail address: *williams.sanyvette@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

II. What Action Is the Agency Taking?

EPA is announcing receipt of an initial filing of a pesticide petition requesting a temporary tolerance exemption from the requirement of a tolerance for *E. coli* 0157:H7 specific bacteriophages used on food-contact surfaces in food processing plants. This pesticide petition is filed under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, proposing the establishment or modification of regulations in part 180 for residues of pesticide chemicals in or on various food commodities. EPA has determined that the pesticide petition described in this notice contains data or information prescribed in FFDCA section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data supports granting of the pesticide petition. Additional data may be needed before EPA can make a final determination on this pesticide petition.

Pursuant to 40 CFR 180.7(f), a summary of the petition that is the subject of this notice, prepared by the petitioner, is included in a docket EPA has created for this rulemaking. The request will include:

- The identity of the pesticide.
- Use of the pesticide.
- Safety issues related to the petition.
- Residue issues related to the petition.
- Practicable methods for removing residues that exceed the tolerance level.
- Proposed tolerance, and;

• Reasonable grounds in support of the petition.

The docket for this petition is available on-line at *http://www.regulations.gov*.

As specified in FFDCA section 408(d)(3), (21 U.S.C. 346a(d)(3)), EPA is publishing notice of the petition so that the public has an opportunity to comment on this request for the establishment or modification of regulations for residues of pesticides in or on food commodities. Further information on the petition may be obtained through the petition summary referenced in this unit.

PP 9G7585. Intralytix, Inc., 701 East Pratt Street, Baltimore, MD 21202, proposes to establish an exemption from the requirement of a tolerance for residues of the antimicrobial, *E. coli* 0157:H7 specific bacteriophages used on food-contact surfaces in food processing plants. The petitioner believes no analytical method is needed because this petition proposes a temporary exemption from the requirement of a tolerance.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 22, 2010.

Joan Harrigan Farrelly,

Director, Antimicrobials Division, Office of Pesticides Programs.

[FR Doc. 2010–10140 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0297; FRL–8821–6]

Pesticide Products; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register pesticide products containing an active ingredient not included in any previously registered pesticide product. Pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before June 4, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2010–0297 by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2010–0297. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Shaunta Hill, Registration Division (7504P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) 347–8961; e-mail address: *hill.shaunta@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

• Crop production (NAICS code 111).

• Animal production (NAICS code 112).

• Food manufacturing (NAICS code 311).

• Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or

CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Registration Applications

EPA has received applications to register pesticide products containing an active ingredient not included in any previously registered pesticide product. Pursuant to the provisions of section 3(c)(4) of FIFRA, EPA is hereby providing notice of receipt and opportunity to comment on these applications. Notice of receipt of these applications does not imply a decision by the Agency on these applications.

File Symbol: 66330-UNG. *Applicant*: Arysta LifeScience, LLC, 15401 Westin Parkway, Suite 150, Cary, NC 27513. *Product name*: Kasugamycin Technical. *Active ingredient*: Kasugamycin hydrochloride at 85.8%. *Proposed classification/Use*: Manufacturing use product.

File Symbol: 66330-UNU. *Applicant*: Arysta LifeScience, LLC 15401 Westin Parkway, Suite 150, Cary, NC 27513. *Product name*: Kasumin 2L. *Active ingredient*: Kasugamycin hydrochloride at 2.3%. *Proposed classification/Use*: Terrestrial food use on pome fruit, walnuts and fruiting vegetables.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: April 20, 2010.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–10137 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0008; FRL–8823–3]

Pesticide Products; Registration Applications

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of applications to register new uses for pesticide products containing currently registered active ingredients, pursuant to the provisions of section 3(c) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. EPA is publishing this notice of such applications, pursuant to section 3(c)(4) of FIFRA.

DATES: Comments must be received on or before June 4, 2010.

ADDRESSES: Submit your comments, identified by the docket identification (ID) number specified within the table below, by one of the following methods:

• *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

• *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.

• *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to the docket ID number specified for the pesticide of interest as shown in the registration application summaries. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: A contact person is listed at the end of each registration application summary and may be contacted by telephone or e-mail. The mailing address for each contact person listed is: Registration Division (7505P), Office of Pesticide Programs, Environmental Protection

Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. Potentially affected entities may include, but are not limited to:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in this unit could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether this action might apply to certain entities. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number). If you are commenting in a docket that addresses multiple products, please indicate to which registration number(s) your comment applies.

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Registration Applications

EPA received applications as follows to register pesticide products containing currently registered active ingredients pursuant to the provisions of section 3(c) of FIFRA, and is publishing this notice of such applications pursuant to section 3(c)(4) of FIFRA. Notice of receipt of these applications does not imply a decision by the Agency on the applications.

1. *Registration Number/File Symbol*: 100–739, 100–1262, 100–1312, 100–1313 and 100–1317. *Docket Number*: EPA–HQ–OPP–2010–0296. *Company name and address*: Syngenta Crop Protection, 410 Swing Road, Greensboro, North Carolina 27419. *Active ingredient*: Difenoconazole. *Proposed Use*: Soybean, strawberry, carrot, stone fruits and chickpeas. *Contact*: Rose Mary Kearns, (703) 305–5611, *kearns.rosemary@epa.gov*.

2. *Registration Number/File Symbol*: 100–936, 100–941 *Docket Number*: EPA–HQ–OPP–2010–0324. *Company name and address*: Syngenta Crop Protection, Inc.; P.O. Box 18300; Greensboro, NC 27419. *Active ingredient*: Thiamethoxam. *Proposed Use*: Alfalfa seed treatment. *Contact*: Julie Chao, (703) 308–8735, *chao.julie@epa.gov*.

3. *Registration Number/File Symbol*: 100–1313. *Docket Number*: EPA–HQ–OPP–2010–0083. *Company name and address*: Syngenta Crop Protection, Inc., P.O. Box 18300, Greensboro, NC 27419–8300. *Active ingredients*: Azoxystrobin and Difenoconazole. *Proposed Uses*: Turf. *Contact*: Shaunta Hill, (703) 347–8961, *hill.shaunta@epa.gov*.

4. *Registration Number/File Symbol*: 264–805, 264–806. *Docket Number*: EPA–HQ–OPP–2010–0311. *Company name and address*: Bayer Cropscience LP, P.O. Box 12014, T.W. Alexander Drive, Research Triangle Park, NC 27709. *Active ingredient*: Thiacloprid. *Proposed Uses*: Stone fruit, crop group 12 and peppers (bell and non bell). *Contact*: Marianne Lewis, (703) 308–8043, *lewis.marianne@epa.gov*.

5. *Registration Number/File Symbol*: 264–1022, 264–1023. *Docket Number*: EPA–HQ–OPP–2010–0266. *Company name and address*: Bayer CropScience LP, P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709. *Active ingredient*: Pyrasulfotole. *Proposed Uses*: Sorghum (grain and forage) and Grass Grown for Seed including Conservation Reserve Program (CRP) acres. Contact: Bethany Benbow, (703) 347–8072, *benbow.bethany@epa.gov*.

6. *Registration Number/File Symbol*: 524–591. *Docket Number*: EPA–HQ–OPP–2010–0284. *Company name and address*: Monsanto Company, 1300 I (Eye) Street, NW., Suite 450 East, Washington, DC 20005. *Active ingredient*: Acetochlor. *Proposed Uses*: Supplemental label to add peanuts as a crop rotation. *Contact*: Erik Kraft, (703) 308–9358, *kraft.erik@epa.gov*.

7. *Registration Number/File Symbol*: 10163–GRL. *Docket Number*: EPA–HQ–OPP–2010–0329. *Company name and address*: Gowan, P.O. Box 5569, Uma, AZ 85366–5569. *Active ingredient*: Prohexadione Calcium. *Proposed Uses*: Turf and ornamentals. *Contact*: Rose Mary Kearns, (703) 305–5611, *kearns.rosemary@epa.gov*.

8. *Registration Number/File Symbol*: 50534–7 and 50534–188. *Docket Number*: EPA–HQ–OPP–2009–0774. *Company name and address*: Syngenta Crop Protection Inc., P.O. Box 18300, Greensboro, NC 27419. *Active ingredient*: Chlorothalonil. *Proposed Use*: For use on low growing berry subgroup, bushberry subgroup, bulb onion subgroup, and green onion subgroup. *Contact*: Rose Mary Kearns, (703) 305–5611, *kearns.rosemary@epa.gov*.

9. *Registration Number/File Symbol*: 59639-RTR. *Docket Number*: EPA–HQ–OPP–2010–0312. *Company name and address*: Valent U.S.A. Corporation, 1600 Riviera Avenue, Suite 200, Walnut Creek, CA 94596. *Active ingredient*: Metconazole. *Proposed Use*: Seed treatment use for canola, corn, cotton, small grains and sugar beets. *Contact*: Tracy Keigwin, (703) 305–6605, *keigwin.tracy@epa.gov*.

10. *Registration Number/File Symbol*: 71711–26, Reg. No. 264–1025 and 264–1026. *Docket Number*: EPA–HQ–OPP–2007–0099. *Company name and*

address: Bayer CropScience LP, P.O. Box 12014, Research Triangle Park, NC 27709. *Active ingredient*: Flubendiamide. *Proposed Uses*: Artichoke, globe, flower head; low growing berry subgroup (CSG 13-07G), except cranberry; peanut, pistachio; small fruit vine climbing subgroup (CSG 13-07F), except fuzzy kiwifruit; sorghum; sugarcane, cane; sunflower, seed; and turnip greens. *Contact*: Carmen Rodia, (703) 306–0327, *rodia.carmen@epa.gov*.

List of Subjects

Environmental protection, Pesticides and pest.

Dated: April 22, 2010.

G. Jeffrey Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2010–10630 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2008–0347; FRL–8823–1]

Carbaryl; Notice of Receipt of Requests To Voluntarily Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of requests by the registrants to voluntarily cancel their registrations of certain products containing the pesticide carbaryl. The requests would not terminate the last carbaryl products registered for use in the United States. EPA intends to grant these requests at the close of the comment period for this announcement unless the Agency receives substantive comments within the comment period that would merit its further review of the requests, or unless the registrants withdraw their requests. If these requests are granted, any sale, distribution, or use of products listed in this notice will be permitted after the registration has been canceled only if such sale, distribution, or use is consistent with the terms as described in the final order.

DATES: Comments must be received on or before June 4, 2010.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2008–0347, by one of the following methods:

- *Federal eRulemaking Portal*: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

Instructions: Direct your comments to docket ID number EPA–HQ–OPP–2008–0347. EPA's policy is that all comments received will be included in the docket without change and may be made available on-line at *http://www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through regulations.gov or e-mail. The regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the docket are listed in the docket index available at *http://www.regulations.gov*. Although, listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the OPP Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Jacqueline Guerry, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (215) 814–2184; fax number: (215) 814–3113; e-mail address: *guerry.jacqueline@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI*. Do not submit this information to EPA through regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Background on the Receipt of Requests To Cancel Registrations

This notice announces receipt by EPA of requests from registrants Bayer Environmental Science and Bayer CropScience to cancel certain carbaryl product registrations. In letters dated March 26, 2010 and April 7, 2010, Bayer Environmental Science and Bayer CropScience, respectively, requested EPA to cancel affected product registrations and to terminate uses of pesticide product registrations identified in Table 1 of this notice. Specifically, Bayer Environmental Science chose not to submit revised section 3 labels in response to the carbaryl product reregistration process, and Bayer CropScience stated the 24c special local need registrations are no longer needed. The registrants' requests will not terminate the last carbaryl products registered in the United States, or the last pesticide products registered in the United States for these uses.

III. What Action Is the Agency Taking?

This notice announces receipt by EPA of requests from registrants to cancel certain carbaryl product registrations. The affected products and the registrants making the requests are identified in Tables 1 and 2 of this unit.

Unless a request is withdrawn by the registrant or if the Agency determines that there are substantive comments that warrant further review of this request, EPA intends to issue an order canceling the affected registrations.

TABLE 1.—CARBARYL PRODUCT REGISTRATIONS WITH PENDING REQUESTS FOR CANCELLATION

Registration No.	Product name	Company
000423–1237	BES Garden Dust 10%	Bayer Environmental Science
000423–1238	AES Carbaryl Insecticide Spray RTU	Bayer Environmental Science
000432–1239	BES Garden Dust 5%	Bayer Environmental Science
000432–1244	AES Sevin Granules Ant, Flea, Tick & Grub Killer (1% Sevin)	Bayer Environmental Science
000264 CA–810059	Sevin 80S	Bayer CropScience
000264 DE–010002	Sevin XLR Plus	Bayer CropScience
000264 FL–890036	Sevin 80S	Bayer CropScience
000264 FL–890037	Sevin 4F	Bayer CropScience
000264 MD–010001	Sevin XLR Plus	Bayer CropScience
000264 PA–010002	Sevin XLR Plus	Bayer CropScience

Table 2 of this unit includes the names and addresses of record for the registrants of the products listed in Table 1 of this unit.

TABLE 2.—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION

EPA company No.	Company name and address
000432	Bayer Environmental Science 2.T.W. Alexander Drive, P.O. Box 12014 Research Triangle Park, NC 27709

TABLE 2.—REGISTRANTS REQUESTING VOLUNTARY CANCELLATION—Continued

EPA company No.	Company name and address
000264	Bayer CropScience 2.T.W. Alexander Drive, P.O. Box 12014 Research Triangle Park, NC 27709

IV. What Is the Agency's Authority for Taking This Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be canceled or amended to terminate one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Section 6(f)(1)(B) of FIFRA requires that before acting on a request for voluntary cancellation, EPA must provide a 30–day public comment period on the request for voluntary cancellation or use termination. In addition, section 6(f)(1)(C) of FIFRA requires that EPA provide a 180–day comment period on a request for voluntary cancellation or termination of any minor agricultural use before granting the request, unless:

1. The registrants request a waiver of the comment period, or

2. The Administrator determines that continued use of the pesticide would pose an unreasonable adverse effect on the environment.

The carbaryl registrants have requested that EPA waive the 180–day comment period. Accordingly, EPA will provide a 30–day comment period on the proposed requests.

V. Procedures for Withdrawal of Requests

Registrants who choose to withdraw a request for product cancellation or use deletion should submit the withdrawal in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**.

If the products have been subject to a previous cancellation action, the effective date of cancellation and all other provisions of any earlier cancellation action are controlling.

VI. Provisions for Disposition of Existing Stocks

Existing stocks are those stocks of registered pesticide products that are currently in the United States and that were packaged, labeled, and released for shipment prior to the effective date of the action. If the requests for voluntary cancellation are granted, the Agency intends to publish the cancellation order in the **Federal Register**.

In any order issued in response to these requests for cancellation of product registrations, EPA proposes to include the following provisions for the treatment of any existing stocks of the products listed in Table 1.

For voluntary product cancellations, registrants will be permitted to sell and distribute existing stocks of voluntarily canceled products for 1–year after the effective date of the cancellation, which will be the date of publication of the cancellation order in the **Federal Register**. Thereafter, registrants will be prohibited from selling or distributing the products identified in Table 1, except for export consistent with section 17 of FIFRA or for proper disposal.

Persons other than the registrant may sell, distribute, or use existing stocks of canceled products until supplies are exhausted, provided that such sale, distribution, or use is consistent with the terms of the previously approved labeling on, or that accompanied, the canceled products.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: April 23, 2010.

Richard P. Keigwin, Jr.,

Director, Pesticide Re-evaluation Division, Office of Pesticide Programs.

[FR Doc. 2010–10643 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2010–0248; FRL–8820–5]

Notice of Receipt of Requests for Amendments To Delete Uses in Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In accordance with section 6(f)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, EPA is issuing a notice of receipt of request for amendments by registrants to delete uses in certain pesticide registrations. Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be amended to delete one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any request in the **Federal Register**.

DATES: The deletions are effective November 1, 2010, unless the Agency receives a written withdrawal request on or before November 1, 2010. The Agency will consider a withdrawal request postmarked no later than November 1, 2010.

Users of these products who desire continued use on crops or sites being deleted should contact the applicable registrant on or before November 1, 2010.

ADDRESSES: Submit your withdrawal request, identified by docket identification (ID) number EPA–HQ–OPP–2010–0248, by one of the following methods:

- *Mail*: Office of Pesticide Programs (OPP) Regulatory Public Docket (7502P), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001.
- *Delivery*: OPP Regulatory Public Docket (7502P), Environmental Protection Agency, Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. Deliveries are only accepted during the Docket Facility's normal hours of operation (8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays). Special arrangements should be made for deliveries of boxed information. The Docket Facility telephone number is (703) 305–5805.

FOR FURTHER INFORMATION CONTACT: Chris Green, Information Technology and Resources Management Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460–0001; telephone number: (703) (347)–0367; e-mail address: *green.christopher@epa.gov*.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. Although, this action may be of particular interest to persons who produce or use pesticides, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the information in this notice, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Copies of This Document and Other Related Information?

EPA has established a docket for this action under docket ID number EPA–HQ–OPP–2010–0248. Publicly available docket materials are available either in the electronic docket at *http://www.regulations.gov*, or, if only available in hard copy, at the Office of Pesticide Programs (OPP) Regulatory Public Docket in Rm. S–4400, One Potomac Yard (South Bldg.), 2777 S. Crystal Dr., Arlington, VA. The hours of operation of this Docket Facility are from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Docket Facility telephone number is (703) 305–5805.

II. What Action Is the Agency Taking?

This notice announces receipt by the Agency of applications from registrants to delete uses in certain pesticide registrations. These registrations are listed in Table 1 of this unit by registration number, product name, active ingredient, and specific uses deleted:

TABLE 1.—REQUESTS FOR AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS

EPA registration No.	Product name	Active ingredient	Delete from label
100-1070	Fusilade DX Herbicide	Fluazifop-p-butyl	For Endive
42519-27	Tegrol Technical Fungicide	Tebuconazole	Use as a seed treatment on wheat and barley
66330-47	TM-442	Chloropicrin	Uses for Enclosed Space Fumigation
69361-14	Triclopyr Technical	Triclopyr	Use on rice

Users of these products who desire continued use on crops or sites being deleted should contact the applicable registrant before November 1, 2010 to discuss withdrawal of the application for amendment. This 180–day period will also permit interested members of the public to intercede with registrants prior to the Agency's approval of the deletion.

Table 2 of this unit includes the names and addresses of record for all registrants of the products listed in Table 1 of this unit, in sequence by EPA company number.

TABLE 2.—REGISTRANTS REQUESTING AMENDMENTS TO DELETE USES IN CERTAIN PESTICIDE REGISTRATIONS

EPA company No.	Company name and address
100	Syngenta Crop Protection, Inc. P.O. Box 18300 Greensboro, NC 27419-8300
42519	Luxembourg-Pamol, Inc. 5100 Poplar Avenue Suite 2700, PMB 111 Memphis, TN 38137
66330	Arysta LifeScience North America, LLC 15401 Weston Parkway, Suite 150 Cary, NC 27513
69361	Repar Corporation 1050 Connecticut Ave. NW Suite 1000 Washington, DC 20036

III. What Is the Agency's Authority for Taking This Action?

Section 6(f)(1) of FIFRA provides that a registrant of a pesticide product may at any time request that any of its pesticide registrations be amended to delete one or more uses. FIFRA further provides that, before acting on the request, EPA must publish a notice of receipt of any such request in the **Federal Register**. Thereafter, the Administrator may approve such a request.

IV. Procedures for Withdrawal of Request

Registrants who choose to withdraw a request for use deletion must submit the withdrawal in writing to Christopher Green using the methods in **ADDRESSES**. The Agency will consider written withdrawal requests postmarked no later than November 1, 2010.

V. Provisions for Disposition of Existing Stocks

The Agency has authorized the registrants to sell or distribute product under the previously approved labeling for a period of 18 months after approval of the revision, unless other restrictions have been imposed, as in special review actions.

List of Subjects

Environmental protection, Pesticides and pests.

Dated: April 15, 2010.

Chandler Sirmons,

Acting Director, Information Technology and Resources Management Division, Office of Pesticide Programs.

[FR Doc. 2010–10228 Filed 5–4–10; 8:45 am]

BILLING CODE 6560–50–S

EXPORT-IMPORT BANK OF THE UNITED STATES

Economic Impact Policy

This notice is to inform the public that the Export-Import Bank of the United States has received an application to provide short-term insurance support for a $12 million revolving credit line for the export of U.S. foundry tooling equipment to Mexico. The U.S. exports will enable the Mexican company to produce up to 8 million automotive engine heads and 1.3 million automotive engine blocks per year. The majority of the Mexican production is expected to be consumed in the United States. Available information indicates that the bulk, if not all, of U.S. production of automotive engine heads and engine blocks is performed by U.S. auto manufacturers at proprietary facilities for their own consumption. Interested parties may submit comments on this transaction by e-mail to *economic.impact@exim.gov* or by mail to 811 Vermont Avenue, NW., Room 1238, Washington, DC 20571, within 14 days of the date this notice appears in the **Federal Register**.

Jonathan J. Cordone,

Senior Vice President and General Counsel.

[FR Doc. 2010–10569 Filed 5–4–10; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92–237; DA 10–717]

Next Meeting of the North American Numbering Council

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: On April 28, 2010, the Commission released a public notice announcing the meeting and agenda of the North American Numbering Council (NANC). The intended effect of this action is to make the public aware of the NANC's next meeting and agenda.

DATES: Friday, May 21, 2010, 9:30 a.m.

ADDRESSES: Requests to make an oral statement or provide written comments to the NANC should be sent to Deborah Blue, Competition Policy Division, Wireline Competition Bureau, Federal Communications Commission, Portals II, 445 Twelfth Street, SW., Room 5–C162, Washington, DC 20554.

FOR FURTHER INFORMATION CONTACT: Deborah Blue, Special Assistant to the Designated Federal Officer (DFO) at (202) 418–1466 or *Deborah.Blue@fcc.gov*. The fax number is: (202) 418–1413. The TTY number is: (202) 418–0484.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's document in CC Docket No. 92–237, DA 10–717 released April 28, 2010. The complete text is this document is available for public inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. The document my also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone (800) 378–3160 or (202) 863–2893, facsimile (202) 863–2898, or via the Internet at *http://www.bcpiweb.com.* It is available on the Commission's Web site at *http://www.fcc.gov.*

The North American Numbering Council (NANC) has scheduled a meeting to be held Friday, May 21, 2010, from 9:30 a.m. until 5 p.m. The meeting will be held at the Federal Communications Commission, Portals II, 445 Twelfth Street, SW., Room TW–C305, Washington, DC. This meeting is open to members of the general public. The FCC will attempt to accommodate as many participants as possible. The public may submit written statements to the NANC, which must be received two business days before the meeting. In addition, oral statements at the meeting by parties or entities not represented on the NANC will be permitted to the extent time permits. Such statements will be limited to five minutes in length by any one party or entity, and requests to make an oral statement must be received two business days before the meeting.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer and Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty). Reasonable accommodations for people with disabilities are available upon request. Include a description of the accommodation you will need, including as much detail as you can. Also include a way we can contact you if we need more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Proposed Agenda: Friday, May 21, 2010, 9:30 a.m.*

1. Announcements and Recent News
2. Approval of Transcript
   —Meeting of February 18, 2010
3. Report from the North American Numbering Plan Billing and Collection (NANP B&C) Agent
4. Report of the Billing & Collection Working Group (B&C WG)
5. Report of the North American Numbering Plan Administrator (NANPA)
6. Report of the National Thousands Block Pooling Administrator (PA)
   —Update on status of requests by states for delegated authority for mandatory number pooling.
7. Report of the Local Number Portability Administration (LNPA) Working Group
8. Report of North American Portability Management LLC (NAPM LLC)
9. Telcordia Dispute Resolution Team: Telcordia Appeal
10. Report of the Numbering Oversight Working Group
11. Status of the Industry Numbering Committee (INC) activities
12. Report of the Future of Numbering Working Group (FoN WG)
13. Summary of Action Items
14. Public Comments and Participation (5 minutes per speaker)
15. Other Business

Adjourn no later than 5 p.m.

*The Agenda may be modified at the discretion of the NANC Chairman with the approval of the DFO.

Federal Communications Commission.

Deborah Blue,

Assistant to the Designated Federal Officer, Wireline Competition Bureau.

[FR Doc. 2010–10554 Filed 5–4–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or To Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be obtained from the National Information Center website at *www.ffiec.gov/nic/.*

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 28, 2010.

A. Federal Reserve Bank of Philadelphia (Michael E. Collins, Senior Vice President) 100 North 6th Street, Philadelphia, Pennsylvania 19105–1521:

1. The Bancorp, Inc., Wilmington, Delaware; to engage *de novo* through its subsidiary, Bancorp Federal Savings Bank, Mount Laurel, New Jersey, in operating a savings association, pursuant to section 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, April 29, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–10509 Filed 5–4–10; 8:45 am]

BILLING CODE 6210–01–SOM019*

FEDERAL RESERVE SYSTEM

Notice of Proposals To Engage in Permissible Nonbanking Activities or To Acquire Companies That Are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act. Additional information on all bank holding companies may be

obtained from the National Information Center website at *www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than May 18, 2010.

A. Federal Reserve Bank of Dallas (E. Ann Worthy, Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. TLCM Holdings, LLC, Richardson, Texas, and EJ Financial Corporation, Dallas, Texas; to engage de novo in extending credit and servicing loans pursuant to Section 225.28(b)(1) of Regulation Y.

Board of Governors of the Federal Reserve System, April 30, 2010.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 2010–10510 Filed 5–4–10; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

Sunshine Act; Notice of Meeting

TIME AND DATE: May 17, 2010 9 a.m. (Eastern Time).

PLACE: 4th Floor Conference Room, 1250 H Street, NW., Washington, DC 20005.

STATUS: Parts will be open to the public and parts closed to the public.

MATTERS TO BE CONSIDERED:

Parts Open to the Public

1. Approval of the minutes of the April 19, 2010 Board member meeting.
2. Thrift Savings Plan activity report by the Executive Director:
a. Monthly Participant Activity Report;
b. Monthly Investment Performance Review;
c. Legislative Report.
3. Mid-Year Budget Review.
4. Recognition of Outstanding Service by Board Members Fink and Whiting.

Parts Closed to the Public

5. Proprietary Data.

FOR FURTHER INFORMATION CONTACT: Thomas J. Trabucco, Director, Office of External Affairs, (202) 942–1640.

Dated: May 3, 2010.

Thomas K. Emswiler,

Secretary, Federal Retirement Thrift Investment Board.

[FR Doc. 2010–10749 Filed 5–3–10; 4:15 pm]

BILLING CODE 6760–01–P

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Commission hereby gives notice of the filing of the following agreements under the Shipping Act of 1984. Interested parties may submit comments on the agreements to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreements are available through the Commission's Web site (*http://www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 011383–044.

Title: Venezuelan Discussion Agreement.

Parties: Hamburg-Süd; King Ocean Service de Venezuela; Mediterranean Shipping Company S.A.; Seaboard Marine Ltd., and SeaFreight Line, Ltd.

Filing Party: Wayne R. Rohde, Esq.; Sher & Blackwell LLP; 1850 M Street, NW.; Suite 900; Washington, DC 20036.

Synopsis: The amendment deletes Compania Sud Americana de Vapores S.A. as a party to the agreement.

Agreement No.: 200317–004.

Title: Tampa Port Authority and Tampa Bay International Terminals, Inc. Operating Agreement.

Parties: Tampa Bay International Terminals, Inc. and Tampa Port Authority.

Filing Parties: Greg Lovelace, Director Cargo & Cruise Marketing; Tampa Port Authority; 1101 Channelside Drive; Tampa, FL 33602.

Synopsis: The amendment extends the agreement through May 29, 2046.

Agreement No.: 201206.

Title: Port of Philadelphia Marine Terminal Association, Inc.

Parties: Delaware River Stevedores, Inc.; The Port of Philadelphia & Camden; and South Jersey Port Corporation.

Filing Party: Francis X. Scanlan, Esq.; Scanlan and Scanlan; Post Office Box 120; Bryn Mawr, PA 19010.

Synopsis: The agreement updates and replaces the parties' previous agreement under FMC Agreement No. 008425.

By Order of the Federal Maritime Commission.

Dated: April 30, 2010.

Rachel E. Dickon,

Assistant Secretary.

[FR Doc. 2010–10517 Filed 5–4–10; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0011; Docket 2010–0083; Sequence 22]

Federal Acquisition Regulation; Information Collection; Preaward Survey Forms (Standard Forms 1403, 1404, 1405, 1406, 1407, and 1408)

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning preaward survey forms (Standard Forms 1403, 1404, 1405, 1406, 1407, and 1408.) A request for public comments was published in the **Federal Register** at 75 FR 4564, January 28, 2010. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before June 4, 2010.

ADDRESSES: Submit comments, including suggestions for reducing this burden to: FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Mr. Warren Blankenship, Procurement Analyst, Contract Policy Branch, GSA, (202) 501–1900 or e-mail *warren.blankenship@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

To protect the Government's interest and to ensure timely delivery of items of the requisite quality, contracting officers, prior to award, must make an affirmative determination that the prospective contractor is responsible, *i.e.,* capable of performing the contract. Before making such a determination, the contracting officer must have in his possession or must obtain information sufficient to satisfy himself that the prospective contractor (i) Has adequate financial resources, or the ability to obtain such resources, (ii) is able to comply with required delivery schedule, (iii) has a satisfactory record of performance, (iv) has a satisfactory record of integrity, and (v) is otherwise qualified and eligible to receive an award under appropriate laws and regulations. If such information is not in the contracting officer's possession, it is obtained through a preaward survey conducted by the contract administration office responsible for the plant and/or the geographic area in which the plant is located. The necessary data is collected by contract administration personnel from available data or through plant visits, phone calls, and correspondence. This data is entered on Standard Forms 1403, 1404, 1405, 1406, 1407, and 1408 in detail commensurate with the dollar value and complexity of the procurement.

B. Annual Reporting Burden

Respondents: 5,800.

Responses per Respondent: 1.

Total Responses: 5,800.

Hours per Response: 21.

Total Burden Hours: 121,800.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street, NW., Room 4041, Washington, DC 20405, telephone (202) 501–4755. Please cite OMB Control Number 9000–0011, Preaward Survey Forms (Standard Forms 1403, 1404, 1405, 1406, 1407, and 1408), in all correspondence.

Dated: April 30, 2010.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 2010–10543 Filed 5–4–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Findings of Misconduct in Science

AGENCY: Office of the Secretary, HHS.

ACTION: Notice.

SUMMARY: Notice is hereby given that on March 18, 2010, the Department of Health and Human Services (HHS) Debarring Official, on behalf of the Secretary of HHS, issued a final notice of debarment based on the misconduct in science findings of the Office of Research Integrity (ORI) in the following case:

Scott J. Brodie, DVM, Ph.D., University of Washington: Based on the findings in an investigation report by the University of Washington (UW) and additional analysis conducted by ORI in its oversight review, ORI found that Scott J. Brodie, DVM, Ph.D., former Research Assistant Professor, Department of Laboratory Medicine, and Director of the UW Retrovirology Pathogenesis Laboratory, UW, committed misconduct in science (scientific misconduct) in research supported by or reported in the following U.S. Public Health Service (PHS) grant applications:

- 1 P01 HD40540–01 (National Institute of Child Health and Human Development [NICHD], National Institutes of Health [NIH])
- 5 P01 HD40540–02 (NICHD, NIH)
- 1 P01 AI057005–01 (National Institute of Allergy and Infectious Diseases [NIAID], NIH)
- 1 R01 DE014149–01 (National Institute of Dental and Craniofacial Research [NIDCR], NIH)
- 2 U01 AI41535–05 (NIAID, NIH)
- 1 R01 HL072631–01 (National Heart, Lung, and Blood Institute [NHLBI], NIH)
- 1 R01 (U01) AI054334–01 (NIAID, NIH)
- 1 R01 DE014827–01 (NIDCR, NIH)
- 1 R01 AI051954–01 (NIAID, NIH).

Specifically, ORI made fifteen findings of misconduct in science based on evidence that Dr. Brodie knowingly and intentionally fabricated and falsified data reported in nine PHS grant applications and progress reports and several published papers, manuscripts, and PowerPoint presentations. The fifteen findings are as follows:

1. Respondent knowingly and intentionally falsified a figure that was presented in manuscripts submitted to the *Journal of Experimental Medicine* and the *Journal of Virology* and in several PowerPoint presentations that purported to represent rectal mucosal leukocytes in some instances and lymph nodes in other instances.

2. Respondent knowingly and intentionally falsified portions of a three-paneled figure included in several manuscript submissions, PowerPoint presentations, and grant applications.

3. Respondent knowingly and intentionally falsified a figure included as Figure 1N in *American Journal of Pathology* 54:1453–1464, 1999, three NIH grant applications, and several PowerPoint presentations.

4. Respondent knowingly and intentionally falsified a figure that was published as an insert within Figure 1K in *American Journal of Pathology* 54:1453, 1999 and included the figure in a number of NIH grant applications.

5. Respondent knowingly and intentionally falsified a figure representing a panel of four green fluorescent cells and included it as a figure in several grant applications claiming that each cell had been subjected to different treatments when three of the cells came from a single image.

6. Respondent knowingly and intentionally falsified an image included as Figure 5A in a paper published in the *Journal of Clinical Investigations* 105:1407, 2000 and submitted to various journals and included in different grant applications.

7. Respondent knowingly and intentionally falsified a figure appearing as Figure 3.III.A, inset, in a manuscript submitted to *Science* entitled "A persistent reservoir of HIV–1 in pulmonary macrophages" and as figures in various grant applications and PowerPoint presentations.

8. Respondent knowingly and intentionally falsified multiple versions of a figure depicting green and red fluorescent cells used as Figures 3.III.H and I in a manuscript submitted to *Science,* as Figures 6C and 6D of NIDCR, NIH, grant application 1 R01 DE14827–01, as Figures C.2.1 1H and C.2.11I of NHLBI, NIH, grant application 1 R01 HL072631–01, and in PowerPoint presentations.

9. Respondent knowingly and intentionally falsified a figure, labeled as Figure 9E in NIDCR, NIH, grant application 1 R01 DE014827–01 and in various other grant applications and PowerPoint presentations.

10. Respondent knowingly and intentionally falsified the bottom half of Figure C.2.5 of NHLBI, NIH, grant application 1 R01 HL072631–01 by using the same image twice, labeling it once as being treated for 2 hours with lipopolysaccharide (LPS) and the second as being treated for 12 hours

with LPS. Respondent also used a second image twice, labeling it once as "no LPS" and the second time as "24 hours with LPS."

11. Respondent knowingly and intentionally falsified a figure that purports to represent viral decay in rectal mucosa and included the figure as a slide in two PowerPoint presentations and three NIH grant applications.

12. Respondent knowingly and intentionally falsified: (a) A histopathology figure that was described in a paper published in the *Journal of Infectious Diseases* 83:1466, 2001, as inguinal lymph nodes from an untreated AIDS patient using *in situ* PCR to show the presence of HIV–1 cells when it was actually from a tissue expressing the neomycin marker; (b) the gel images resembling Figures 2A and C, which Respondent claimed to be based on *lymph node cells,* although he reported the gel images elsewhere to represent results from *rectal tissue;* and (c) various versions of these blots that Respondent reported elsewhere and labeled differently with respect to the copy numbers detected and as detecting DNA in some instance and RNA in others.

13. Respondent knowingly and intentionally falsified Figures 2DI and 2DII included in a paper published in the *Journal of Leukocyte Biology* 68:351–359, 2000.

14. Respondent knowingly and intentionally falsified Figure 4, Panels A and B, in NIDCR, NIH, grant application 1 R01 DE014827–01 by manipulating the source images.

15. Respondent knowingly and intentionally falsified a number of figures and made false statements in the text of NIAID, NIH, grant application 1 R01 AI051954–01 submitted jointly with a colleague by relabeling figures based on research carried out with HIV–1 or HIV–2 and identifying the figures and text as research conducted with ovine lentivirus (OvLV).

ORI issued a charge letter enumerating the above findings of misconduct in science and proposing HHS administrative actions. Dr. Brodie subsequently requested a hearing before an Administrative Law Judge (ALJ) of the Departmental Appeals Board to dispute these findings. In January 2009, the ALJ issued a ruling holding that there were no triable issues challenging ORI's findings that there were materially false statements, images, and other data in the relevant publications, presentations, and grant applications. However, the ALJ held that Dr. Brodie raised triable issues about his intent to commit scientific misconduct and the reasonableness of the proposed debarment of seven (7) years.

On January 12, 2010, the ALJ issued a recommended decision to the HHS Assistant Secretary for Health (ASH) granting summary disposition to ORI. The ALJ also stated that Dr. Brodie committed scientific misconduct on multiple occasions and that its extent amply justified debarment for a period of seven (7) years. Pursuant to 42 CFR 93.523(c), the ASH forwarded the ALJ's recommended decision to the HHS Debarring Official, which constituted the findings of fact required under 2 CFR parts 180 and 376.

On February 1, 2010, Dr. Brodie submitted a letter to the HHS Debarring Official with attachments to request that the ALJ's recommended decision be rejected as a whole. On February 26, 2010, Dr. Brodie submitted a letter requesting the opportunity to meet with the HHS Debarring Official to orally present the reasons supporting his request that the ALJ's recommended decision be rejected. However, the HHS Debarring Official determined that Dr. Brodie had been afforded an opportunity to contest ORI's findings of scientific misconduct in accordance with 42 CFR part 93, subpart E. Given the findings of facts in this case, the HHS Debarring Official determined that the issues in his presentation in opposition to the ALJ's recommended decision did not raise a genuine dispute over facts material to the recommended debarment. Accordingly, the HHS Debarring Official also denied Dr. Brodie's request to make an oral presentation and issued a notice of debarment to begin on March 18, 2010, and end on March 17, 2017.

On March 23, 2010, Dr. Brodie submitted a letter requesting a postponement of the effective date of the debarment. This request was denied by the Debarring Official on April 6, 2010.

Thus, the misconduct in science findings set forth above became effective, and the following administrative actions have been implemented for a period of seven (7) years, beginning on March 18, 2010:

(1) Dr. Brodie has been debarred from any contracting or subcontracting with any agency of the United States Government and from eligibility or involvement in nonprocurement programs of the United States Government referred to as "covered transactions" pursuant to the Department of Health and Human Service's Implementation (2 CFR part 376 *et seq.*) of OMB Guidelines to Agencies on Governmentwide Debarment and Suspension, 2 CFR part 180; and

(2) Dr. Brodie is prohibited from serving in any advisory capacity to PHS including but not limited to service on any PHS advisory committee, board, and/or peer review committee, or as consultant.

FOR FURTHER INFORMATION CONTACT: Director, Division of Investigative Oversight, Office of Research Integrity, 1101 Wootton Parkway, Suite 750, Rockville, MD 20852, (240) 453–8800.

John Dahlberg,

Director, Division of Investigative Oversight, Office of Research Integrity.

[FR Doc. 2010–10605 Filed 5–4–10; 8:45 am]

BILLING CODE 4160–17–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–10–0733]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call Maryam I. Daneshvar, the CDC Reports Clearance Officer, at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Early Hearing Detection and Intervention Hearing Screening and Follow-up Survey (OMB No. 0920–0733 exp. 10/31/2009)—Reinstatement With Change—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The National Center on Birth Defects and Developmental Disabilities at CDC promotes the health of babies, children, and adults with disabilities. As part of these efforts the Center is actively involved in addressing hearing loss (HL) among newborns and infants. HL is a common birth defect that affects approximately 12,000 infants each year and, when left undetected, can result in developmental delays. As awareness about infant HL increases, so does the

demand for accurate information about rates of screening, referral, loss to follow-up, and prevalence. This information is important for: (a) Helping to ensure infants and children are receiving recommended screening and follow-up services, (b) identifying reasons for not receiving recommended services and (c) documenting the occurrence of differing degrees of HL among infants. These data will also assist the States in Early Hearing Detection and Intervention (EHDI) programs with quality improvement activities and provide information that will be helpful in assessing the impact of Federal initiatives. The public will be able to access this information via the CDC EHDI Web site (*http://www.cdc.gov/ncbddd/ehdi*).

Given the lack of a standardized and readily accessible source of data, the CDC EHDI program developed a survey to be used annually that utilizes uniform definitions to collect aggregate, standardized EHDI data from States and territories. The request to complete this survey is planned to be disseminated to 57 respondents via an e-mail, which will include a summary of the request and other relevant information. We anticipate that about 50 of the 57 coordinators will complete and return the survey. Minor changes to this survey, based on respondent feedback, are planned in order to make the survey easier to complete and further improve data quality. These changes include adding a question about how many infants with hearing loss are receiving only monitoring services, simplifying the table for reporting type and severity of hearing loss data, and expanding the maternal race categories in the demographic section. There are no costs to the respondents other than their time. The estimated annualized burden hours are 210.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
EHDI Program State Program Coordinators Contacted	57	1	10/60
EHDI Program State Program Coordinators Who Return the Survey	50	1	4

Dated: April 28, 2010.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–10587 Filed 5–4–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60 Day–10–10CV]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. Alternatively, to obtain a copy of the data collection plans and instrument, call 404–639–5960 and send comments to Maryam I. Daneshvar, CDC Reports Clearance Officer, 1600 Clifton Road, NE., MS–D74, Atlanta, Georgia 30333; comments may also be sent by e-mail to *omb@cdc.gov.*

Comments are invited on (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have a practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarify of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Early Aberration Reporting System (EARS) Registration Module—New—National Center for Emerging and Zoonotic Infectious Diseases (NCEZID) (proposed), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

To support two of CDC's main priority areas: (1) Improving CDC's support for state and local health departments, and (2) strengthening surveillance and epidemiology, CDC is requesting approval from the Office of Management and Budget (OMB) to improve the Early Aberration Reporting System (EARS) by collecting data from individuals who request a download of EARS from the CDC website.

The Early Aberration Reporting System, developed within the Division of Bioterrorism Preparedness and Response, is a web-enabled tool that analyzes public health surveillance data using methods that detect abnormal trends that could possibly indicate an outbreak of infectious disease. The local public health professionals manage the entire tool and can implement the defaults or can adjust the tool in order to meet their local needs. The goal of this process is to assist public health professionals in the early identification of outbreaks of disease as well as bioterrorism events. EARS is used to assess whether the current number of reported cases of an event is higher than usual.

The term syndromic surveillance is used to describe surveillance that uses health-related data that precede diagnosis and that signals a sufficient probability of a case or an outbreak of infectious disease to warrant further public health response. Syndromic surveillance systems are used by state, local, national and international health departments to monitor syndrome-based (*e.g.,* case information collected in emergency departments (EDs) and diagnostic data sources for early detection of outbreaks and other public health events). More recently these systems are used during public health responses to provide more rapid near real-time situational awareness regarding the health status of the target population. EARS was the first software platform to support local syndromic surveillance systems. EARS has been designed and used to monitor syndromic data from emergency departments, 911 calls, physician office data, school and business absenteeism, over-the-counter drug sales, laboratory testing and results data and reportable disease surveillance systems. In the past several years, EARS systems have been integral in the local public health surveillance arsenal. EARS has been used at events such as the Beijing Summer Olympics; multiple

Superbowls (football) and World Series (baseball); the political conventions of both major US political parties; and the Presidential Inauguration (2009).

Today, EARS is a highly successful and sustainable system and has over 200 users at the Federal, State, local, and international levels. These users include international Ministries of Health and domestic state and local public health departments. Additionally, EARS detection methods have been integrated in well-known surveillance platforms such as BioSense at CDC, ESSENSE at Johns Hopkins, NAMRD at US Department of Defense, and Emergint at Northrop Grumman.

EARS is widely-accepted and easily sustainable due to its being free to all end users, the capacity to use multiple forms of data, flexibility and user-driven design and maintenance. EARS is a service provided by CDC as share-ware and is available by download at no cost from the CDC Web site *http://www.bt.cdc.gov/surveillance/EARS.*

In an effort to continue to improve and enhance EARS, the collection of registration information is needed to track users and organizations to assist in future needs assessments. Requiring the users to register will provide CDC with contact information (*i.e.,* e-mail addresses) to use for broadcast e-mails regarding new releases for upgrades and enhancements; track the number of users, the download frequency, and the type of data that users will monitor with EARS; and solicit users for feedback for future upgrades and enhancements. CDC estimates that there will be 150 respondents registered for EARS. Each respondent will need an average of 10 minutes to complete the EARS registration form which leads to a total public burden of 25 hours.

There is no cost to respondents to participate in this program.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Respondents	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Users	150	1	10/60	25

Dated: April 21, 2010.

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–10586 Filed 5–4–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–10–0741]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call Maryam I. Daneshvar, the CDC Reports Clearance Officer, at (404) 639–5960 or send an e-mail to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

The Study to Explore Early Development (SEED) (OMB No. 0920–0741 exp. 6/30/2010)—Revision—National Center on Birth Defects and Developmental Disabilities (NCBDDD), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

This data collection is based on the following components of the Public Health Service Act: (1) Act 42 U.S.C. 241, Section 301, which authorizes "research, investigations, experiments, demonstrations, and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases and impairments of man." (2) 42 U.S.C. 247b–4, Section 317 C, which authorizes the activities of the National Center on Birth Defects and Developmental Disabilities. This section was created by Public Law 106–310, also known as "the Children's Health Act of 2000." This portion of the code has also been amended by Public Law 108–154, which is also known as the "Birth Defects and Developmental Disabilities Prevention Act of 2003."

The Children's Health Act of 2000 mandated CDC to establish autism surveillance and research programs to address the number, incidence, correlates, and causes of autism and related disabilities. Under the provisions of this act, CDC funded five Centers for Autism and Developmental Disabilities Research and Epidemiology (CADDRE) including the California Department of Health and Human Services, Colorado Department of Public Health and Environment, Johns Hopkins University, the University of Pennsylvania, and the University of North Carolina at Chapel Hill. CDC National Center on Birth Defects and Developmental Disabilities participates as the sixth CADDRE site. The SEED multi-site, collaborative project is an epidemiological investigation of possible causes for the autism spectrum disorders.

Study participants are to be selected from children born in and residing in the following six areas: Atlanta metropolitan area, San Francisco Bay area, Denver metropolitan area, Baltimore metropolitan area, Philadelphia metropolitan area, and Central North Carolina. Children with autism spectrum disorders are compared to children with other developmental problems, referred to as the neurodevelopmentally impaired group (NIC), as well as children who do not have developmental problems, referred to as the sub-cohort.

Data collection methods consist of the following: (1) Medical record review of the child participant; (2) medical record review of the biological mother of the child participant; (3) packets sent to the participants with self-administered questionnaires and a buccal swab kit; (4) a telephone interview focusing on pregnancy-related events and early life history (biological mother and/or primary caregiver interview); (5) a child development evaluation (more comprehensive for case participants than for the control group participants); (6) parent-child development interview (for case participants only) administered over the telephone or in-person; (7) a physical exam of the child participant; (8) biological sampling of the child participant (blood and hair); and, (9)

biological sampling of the biological parents of the child participant (blood only). Minor changes to some of the self administered questionnaires and the telephone interview include clarification of instructions to the respondent and clarifying specific questions to make the instruments easier to complete and further improve data quality. The only study design change that is being proposed is to expand the eligible study participant birth date range from September 1, 2003–August 31, 2005 to September 1, 2003–August 31, 2006.

There is no cost to respondents other than their time. The total estimated annualized burden is 4,948 hours.

ESTIMATE OF ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Responses per respondent	Avg. burden per response (in hours)
Parent	Response Card	2,458	1	10/60
Parent	Invitation packet	1,008	1	30/60
Parent	Questionnaire packet	347	1	3.5
Parent	Caregiver Interview packet	402	1	1.5
Parent	Follow-up telephone call packet	347	3	20/60
Parent and Child	Biosample packet	1,041	1	40/60
Parent and Child	Blood Draw	966	1	15/60
Child	Clinic Visit—control children packet	214	1	1
Parent	Clinic Visit—control parent	80	1	45/60
Parent	Control parent consent form	214	1	10/60
Child	Clinic Visit—Case children packet	107	1	1.5
Parent	Clinic Visit—Case parent packet	107	1	3.5
Parent	Medical Record Abstraction	347	5	3/60

Maryam I. Daneshvar,

Acting Reports Clearance Officer, Centers for Disease Control and Prevention.

[FR Doc. 2010–10585 Filed 5–4–10; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0483]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Medical Device User Fee Cover Sheet—Form FDA 3601

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Medical Device User Fee Cover Sheet—Form FDA 3601" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of January 19, 2010 (75 FR 2866), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0511. The approval expires on February 28, 2013. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain*.

Dated: April 29, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–10579 Filed 5–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0486]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Guidance for Industry, Food and Drug Administration, and Foreign Governments: Fiscal Year 2010 Medical Device User Fee Small Business Qualification and Certification

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Guidance for Industry, FDA, and Foreign Governments: Fiscal Year 2010 Medical Device User Fee Small Business Qualification and Certification" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of January 19, 2010 (75 FR 2874), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0508. The approval expires on February 28, 2013. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain*.

Dated: April 29, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–10581 Filed 5–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0475]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Administrative Detention and Banned Medical Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Administrative Detention and Banned Medical Devices" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of January 19, 2010 (75 FR 2871), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0114. The approval expires on February 28, 2013. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain*.

Dated: April 29, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–10580 Filed 5–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–N–0474]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Inspection by Accredited Persons Program Under the Medical Device User Fee and Modernization Act of 2002

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled "Inspection by Accredited Persons Program Under the Medical Device User Fee and Modernization Act of 2002" has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, e-mail: *Daniel.Gittleson@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of January 19, 2010 (75 FR 2871), the agency announced that the proposed information collection had been submitted to OMB for review and clearance under 44 U.S.C. 3507. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0510. The approval expires on February 28, 2013. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain*.

Dated: April 29, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–10577 Filed 5–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0198]

Agency Information Collection Activities; Proposed Collection; Comment Request; Premarket Notification

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on premarket notification.

DATES: Submit written or electronic comments on the collection of information by July 6, 2010.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov*. Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccad Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information,

including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Premarket Notification—21 CFR Part 807, Subpart E—(OMB Control Number 0910–0120)—Extension

Section 510(k) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360(k)) and the implementing regulation under part 807 (21 CFR part 807, subpart E) require a person who intends to market a medical device to submit a premarket notification submission to FDA at least 90 days before proposing to begin the introduction or delivery for introduction into interstate commerce for commercial distribution of a device intended for human use. Based on the information provided in the notification, FDA must determine whether the new device is substantially equivalent to a legally marketed device, as defined in § 807.92(a)(3). If the device is determined to be not substantially equivalent to a legally marketed device, it must have an approved premarket approval application (PMA), Product Development Protocol, Humanitarian Device Exemption (HDE), Petition for Evaluation of Automatic Class III Designation (de novo) or be reclassified into class I or class II before being marketed. FDA makes the final decision of whether a device is substantially equivalent or not equivalent.

Section 807.81 states when a premarket notification is required. A premarket notification is required to be submitted by a person who is:

- Introducing a device to the market for the first time;
- Introducing a device into commercial distribution for the first time by a person who is required to register; and
- Introducing or reintroducing a device which is significantly changed or modified in design, components, method of manufacturer, or the intended use that could affect the safety and effectiveness of the device.

Section 807.87 specifies information required in a premarket notification submission.

Section 204 of the Food and Drug Administration Modernization Act (FDAMA) amended section 514 of the act (21 U.S.C. 360d). Amended section 514 allows FDA to recognize consensus standards developed by international and national organizations for use in satisfying portions of device premarket review submissions including premarket notifications or other requirements. FDA has published and updated the list of recognized standards regularly since enactment of FDAMA and has allowed 510(k) submitters to certify conformance to recognized standards to meet the requirements of § 807.87. Form FDA 3654, the 510(k) Standards Data Form, standardizes the format for submitting information on consensus standards that a 510(k) submitter chooses to use as a portion of their premarket notification submission. (The Form FDA 3654 is not for declarations of conformance to a recognized standard FDA believes that use of this form will simplify the 510(k) preparation and review process for 510(k) submitters.

Form FDA 3514, a summary cover sheet form, assists respondents in categorizing administrative 510(k) information for submission to FDA. This form also assists respondents in categorizing information for other FDA medical device programs such as PMAs, investigational device exemptions, and HDEs. Under § 807.87(h), each 510(k) submitter must include in the 510(k) either a summary of the information in the 510(k) as required by § 807.92 (510(k) summary) or a statement certifying that the submitter will make available upon request the information in the 510(k) with certain exceptions as per § 807.93 (510(k) statement). If the 510(k) submitter includes a 510(k) statement in the 510(k) submission, § 807.93 requires that the official correspondent of the firm make available within 30 days of a request, all information included in the submitted premarket notification on safety and effectiveness. This information will be provided to any person within 30 days of a request if the device described in the 510(k) submission is determined to be substantially equivalent. The information provided will be a duplicate of the 510(k) submission including any safety and effectiveness information, but excluding all patient identifiers and trade secret and commercial confidential information.

According to § 807.90, submitters may request information on their 510(k) review status 90 days after the initial log-in date of the 510(k). Thereafter, the submitter may request status reports every 30 days following the initial status request. To obtain a 510(k) status report, the submitter should complete the status request form, Form FDA 3541, and fax it to the Center for Devices and Radiological Health office identified on the form.

The most likely respondents to this information collection will be specification developers and medical device manufacturers.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]

21 CFR Section	Form Number	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
807 subpart E		3,700	1	3,700	79	292,300
807.87	FDA Form 3514	1,956	1	1,956	0.5	978
807.90(a)(3)	FDA Form 3541	218	1	218	0.25	55
807.87(d) and (f)	FDA Form 3654	1,500	1	1,500	10	15,000

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN[1]—Continued

21 CFR Section	Form Number	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
807.93		2,000	1	2,000	0.5	1,000
Totals						309,333

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

FDA has based these estimates on conversations with industry and trade association representatives, and from internal review of the documents listed in table 1 of this document.

Dated: April 29, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–10576 Filed 5–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–P–0284]

Determination That BREVIBLOC (Esmolol Hydrochloride) Injection, 250 Milligrams/Milliliter, 10-Milliliter Ampule, Was Withdrawn From Sale for Reasons of Safety or Effectiveness

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has determined that BREVIBLOC (esmolol hydrochloride (HCl)) Injection, 250 milligrams (mg)/milliliter (mL), 10-mL ampule, was withdrawn from sale for reasons of safety or effectiveness. This determination means the agency will not accept or approve abbreviated new drug applications (ANDAs) for esmolol HCl injection, 250 mg/mL, 10-mL ampule.

FOR FURTHER INFORMATION CONTACT: Olivia A. Pritzlaff, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6308, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION: In 1984, Congress enacted the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417) (the 1984 amendments), which authorized the approval of duplicate versions of drug products approved under an ANDA procedure. ANDA applicants must, with certain exceptions, show that the drug for which they are seeking approval contains the same active ingredient in the same strength and dosage form as the "listed drug," which is a version of the drug that was previously approved under a new drug application (NDA). ANDA applicants do not have to repeat the extensive clinical testing otherwise necessary to gain approval of an NDA. The only clinical data required in an ANDA are data to show that the drug that is the subject of the ANDA is bioequivalent to the listed drug.

The 1984 amendments include what is now section 505(j)(7) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 355(j)(7)), which requires FDA to publish a list of all approved drugs. FDA publishes this list as part of the "Approved Drug Products With Therapeutic Equivalence Evaluations," which is generally known as the "Orange Book." Under FDA regulations, drugs are removed from the list if the agency withdraws or suspends approval of the drug's NDA or ANDA for reasons of safety or effectiveness, or if FDA determines that the listed drug was withdrawn from sale for reasons of safety or effectiveness (section 505(j)(7)(C) of the act; 21 CFR 314.162).

FDA will not approve an ANDA if the listed drug has been withdrawn from sale for safety or effectiveness reasons (section 505(j)(4)(I) of the act). Under § 314.161(a)(1) (21 CFR 314.161(a)(1)), the agency must determine whether a listed drug was withdrawn from sale for reasons of safety or effectiveness before an ANDA that refers to that listed drug may be approved. A drug that has been withdrawn from the market for safety or effectiveness reasons is not a listed drug (21 CFR 314.3(b)). FDA may not approve an ANDA that does not refer to a listed drug.

BREVIBLOC (esmolol HCl)) Injection is the subject of NDA 19–386, held by Baxter Healthcare Corp. (Baxter). BREVIBLOC is a beta$_1$-selective adrenergic receptor-blocking agent with a short duration of action. BREVIBLOC is approved for the treatment of supraventricular tachycardia. BREVIBLOC is also indicated for treatment of intraoperative and postoperative tachycardia and/or hypertension.

Baxter currently markets 4 product presentations of BREVIBLOC Injection—10-mg/mL and 20-mg/mL ready-to-use vials and 10-mg/mL and 20-mg/mL premixed injection bags. Baxter has discontinued marketing the following two product presentations of BREVIBLOC (esmolol HCl) Injection:

- In 2003, Baxter discontinued BREVIBLOC (esmolol HCl) Injection, 10 mg/mL (formulation without sodium chloride), and FDA determined that this presentation of BREVIBLOC Injection was not withdrawn from sale for reasons of safety or effectiveness (69 FR 47155, August 4, 2004).
- In 2007, Baxter discontinued BREVIBLOC (esmolol HCl) Injection, 250 mg/mL, 10-mL ampule. In a letter dated June 28, 2007, Baxter informed the agency that the company had decided to cease manufacture and distribution of BREVIBLOC (esmolol HCl) Injection, 250 mg/mL, 10-mL ampule, because the product demonstrated a higher risk of medication errors that may potentially result in serious outcomes. Baxter observed that serious adverse events were associated with the following medication errors:
- Mixups between the ready-to-use 10-mg/mL vial and the 250-mg/mL, 10-mL ampule concentrate;
- Use of undiluted 250-mg/mL, 10-mL ampule concentrate;
- Dilution calculation errors with the 250-mg/mL, 10-mL ampule concentrate; and
- Administration of the wrong drug.

In a Dear Healthcare Professional letter dated August 20, 2007, Baxter stated that their decision to cease manufacture of BREVIBLOC (esmolol HCl) Injection, 250 mg/mL, 10-mL ampule, was made after thorough review of adverse event reports, clinical usage studies, input from clinicians, and initiatives to reduce medication errors.

In a citizen petition dated March 27, 2008 (Docket No. FDA–2008–P–0284), submitted under 21 CFR 10.30 and in accordance with 21 CFR 314.122 and 314.161, Bedford Laboratories (Bedford) requested that the agency determine

whether BREVIBLOC (esmolol HCl) Injection, 250 mg/mL, 10-mL ampule, was withdrawn from sale for reasons of safety or effectiveness. Bedford noted that Baxter has publicly stated that the product was discontinued due to safety issues surrounding medication errors and asked the agency to determine the cause of the discontinuation.

We have carefully reviewed our files for records concerning the withdrawal from sale of BREVIBLOC (esmolol HCl) Injection, 250 mg/mL, 10-mL ampule, including the NDA file for this drug product. We have also independently evaluated relevant literature and data for possible postmarketing adverse event reports. FDA's review shows that the product was withdrawn from sale because of reports of serious adverse events, including deaths.

Although the application holder has made several labeling revisions (including a warning sticker on the ampule) and issued Dear Healthcare Provider letters to reduce the potential for medication errors, there have been additional reports of medication errors. In addition, alternative presentations of the product are available that are not associated with the same potential for medication errors.

After considering the citizen petition (and comments submitted) and reviewing agency records concerning the drug product, analyses of adverse event reports, and relevant literature, FDA has determined under § 314.161 that BREVIBLOC (esmolol HCl) Injection, 250 mg/mL, 10-mL ampule, was withdrawn from sale for reasons of safety or effectiveness. FDA has reviewed the latest approved labeling for BREVIBLOC (esmolol HCl) Injection, 250 mg/mL, 10-mL ampule, and has determined that this labeling is inadequate to reduce medication errors to an acceptable level. FDA has determined that Human Factors studies (i.e., Failure Mode and Effects Analysis and usability studies to test the product in a typical practice setting) are necessary before this product could be considered for reintroduction to the market.

Therefore, the agency has determined, under § 314.161, that BREVIBLOC (esmolol HCl) Injection, 250 mg/mL, 10-mL ampule, was withdrawn from sale for reasons of safety. BREVIBLOC (esmolol HCl) Injection, 250 mg/mL, 10-mL ampule, will be removed from the list of drug products published in the Orange Book. FDA will not accept or approve ANDAs that refer to BREVIBLOC (esmolol HCl) Injection, 250 mg/mL, 10-mL ampule.

Dated: April 30, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–10559 Filed 5–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Fiscal Year (FY) 2010 Funding Opportunity

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice of intent to award a Single Source Grant to the grantee of the Technical Assistance Center for Mental Health Promotion and Youth Violence Prevention.

SUMMARY: This notice is to inform the public that the Substance Abuse and Mental Health Services Administration (SAMHSA) intends to award approximately $620,000 for up to three years to the grantee of the Technical Assistance Center for Mental Health Promotion and Youth Violence Prevention. This is not a formal request for applications. Assistance will be provided only to the current grantee of the Technical Assistance Center for Mental Health Promotion and Youth Violence Prevention based on the receipt of a satisfactory application that is approved by an independent review group.

Funding Opportunity Title: SM–10–018.

Catalog of Federal Domestic Assistance (CFDA) Number: 93.243.

Authority: Section 520A of the Public Health Service Act, as amended.

Justification: Only an application from the grantee for the Technical Assistance Center for Mental Health Promotion and Youth Violence Prevention will be considered for funding under this announcement. Three-year funding has become available to assist because this funding supplement is intended to support the technical assistance needs of Project LAUNCH grantees to be newly funded in FY 2010. The current grantee provides technical assistance to the other cohorts for Project LAUNCH and is in a unique position to address the grant implementation needs of communities to be funded this fiscal year. There is no other potential organization with the required access and expertise.

Eligibility for this program supplement is restricted to the current grantee, Technical Assistance Center for Mental Health Promotion and Youth Violence Prevention. This supplement will serve to maximize efficiencies created under the current services infrastructure. It would be inefficient and duplicative to fund additional technical assistance services for Project LAUNCH grantees through a second organization.

Contact: Shelly Hara, Substance Abuse and Mental Health Services Administration, 1 Choke Cherry Road, Room 8–1095, Rockville, MD 20857; telephone: (240) 276–2321; E-mail: *shelly.hara@samhsa.hhs.gov.*

Toian Vaughn,

SAMHSA Committee Management Officer.

[FR Doc. 2010–10502 Filed 5–4–10; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2004–N–0451] (formerly Docket No. 2004N–0226)

Food and Drug Administration Modernization Act of 1997: Modifications to the List of Recognized Standards, Recognition List Number: 023

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing a publication containing modifications the agency is making to the list of standards FDA recognizes for use in premarket reviews (FDA recognized consensus standards). This publication, entitled "Modifications to the List of Recognized Standards, Recognition List Number: 023" (Recognition List Number: 023), will assist manufacturers who elect to declare conformity with consensus standards to meet certain requirements for medical devices.

DATES: Submit written or electronic comments concerning this document at any time. See section VII of this document for the effective date of the recognition of standards announced in this document.

ADDRESSES: Submit written requests for single copies of "Modifications to the List of Recognized Standards, Recognition List Number: 023" to the Division of Small Manufacturers, International, and Consumer Assistance, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66,

rm. 4613, Silver Spring, MD 20993–0002. Send two self-addressed adhesive labels to assist that office in processing your requests, or fax your request to 301–847–8149. Submit written comments concerning this document, or recommendations for additional standards for recognition, to the contact person (see **FOR FURTHER INFORMATION CONTACT**). Submit electronic comments by e-mail: *standards@cdrh.fda.gov*. This document may also be accessed on FDA's Internet site at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfTopic/cdrhnew.cfm*. See section VI of this document for electronic access to the searchable database for the current list of FDA recognized consensus standards, including Recognition List Number: 023 modifications and other standards related information.

FOR FURTHER INFORMATION CONTACT: Carol L. Herman, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 3632, Silver Spring, MD 20993–0002, 301–796–6574.

SUPPLEMENTARY INFORMATION:

I. Background

Section 204 of the Food and Drug Administration Modernization Act of 1997 (FDAMA) (Public Law 105–115) amended section 514 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360d). Amended section 514 allows FDA to recognize consensus standards developed by international and national organizations for use in satisfying portions of device premarket review submissions or other requirements.

In a notice published in the **Federal Register** of February 25, 1998 (63 FR 9561), FDA announced the availability of a guidance entitled "Recognition and Use of Consensus Standards." The notice described how FDA would implement its standard recognition program and provided the initial list of recognized standards.

Modifications to the initial list of recognized standards, as published in the **Federal Register**, are identified in table 1 of this document.

TABLE 1.—PREVIOUS PUBLICATIONS OF STANDARD RECOGNITION LISTS

February 25, 1998 (63 FR 9561)	May 27, 2005 (70 FR 30756)
October 16, 1998 (63 FR 55617)	November 8, 2005 (70 FR 67713)
July 12, 1999 (64 FR 37546)	March 31, 2006 (71 FR 16313)
November 15, 2000 (65 FR 69022)	June 23, 2006 (71 FR 36121)
May 7, 2001 (66 FR 23032)	November 3, 2006 (71 FR 64718)
January 14, 2002 (67 FR 1774)	May 21, 2007 (72 FR 28500)
October 2, 2002 (67 FR 61893)	September 12, 2007 (72 FR 52142)
April 28, 2003 (68 FR 22391)	December 19, 2007 (72 FR 71924)
March 8, 2004 (69 FR 10712)	September 9, 2008 (73 FR 52358)
June 18, 2004 (69 FR 34176)	March, 18, 2009 (74 FR 11586)
October 4, 2004 (69 FR 59240)	September 8, 2009 (74 FR 46203)

These notices describe the addition, withdrawal, and revision of certain standards recognized by FDA. The agency maintains "hypertext markup language (HTML)" and "portable document format (PDF)" versions of the list of "FDA Recognized Consensus Standards." Both versions are publicly accessible at the agency's Internet site. See section VI of this document for electronic access information. Interested persons should review the supplementary information sheet for the standard to understand fully the extent to which FDA recognizes the standard.

II. Modifications to the List of Recognized Standards, Recognition List Number: 023

FDA is announcing the addition, withdrawal, correction, and revision of certain consensus standards the agency will recognize for use in satisfying premarket reviews and other requirements for devices. FDA will incorporate these modifications in the list of FDA Recognized Consensus Standards in the agency's searchable database. FDA will use the term "Recognition List Number: 023" to identify these current modifications.

In table 2 of this document, FDA describes the following modifications: (1) The withdrawal of standards and their replacement by others; (2) the correction of errors made by FDA in listing previously recognized standards; and (3) the changes to the supplementary information sheets of recognized standards that describe revisions to the applicability of the standards.

In section III of this document, FDA lists modifications the agency is making that involve the initial addition of standards not previously recognized by FDA.

TABLE 2.—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS

Old Recognition No.	Replacement Recognition No.	Standard	Change
A. Biocompatibility			
2–64	2–153	ANSI/AAMI/ISO 10993–5:2009 Biological Evaluation of Medical Devices—Part 5: Tests for *in vitro* Cytotoxicity	Withdrawn and replaced with newer version
2–67	2–154	ASTM F756—08 Standard Practice for Assessment of Hemolytic Properties of Materials	Withdrawn and replaced with newer version
2–82	2–155	ASTM F2147–01 (Reapproved 2006) Standard Practice for Guinea Pig: Split Adjuvant and Closed Patch Testing for Contact Allergens	Withdrawn and replaced with newer version
2–87		ISO 10993–10:2002 Biological Evaluation of Medical Devices—Part 10: Tests for Irritation and Delayed-Type Hypersensitivity	Title, Extent of recognition, and Relevant guidance
2–93		ASTM F 763—04 Standard Practice for Short-Term Screening of Implant Materials	Extent of recognition

TABLE 2.—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old Recognition No.	Replacement Recognition No.	Standard	Change
2–94		ASTM F 981—04 Standard Practice for Assessment of Compatibility of Biomaterials for Surgical Implants with Respect to Effect of Materials on Muscle and Bone	Extent of recognition
2–96		ASTM F 1903—98 (Reapproved 2003) Standard Practice for Testing For Biological Responses to Particles *in vitro*	Title and Extent of recognition
2–98		ANSI/ AAMI/ ISO 10993–1:2003 Biological Evaluation of Medical Devices—Part 1: Evaluation and Testing	Title, Extent of recognition, and Relevant guidance
2–100		ASTM E 1372—95 (Reapproved 2003) Standard Test Method for Conducting a 90-Day Oral Toxicity Study in Rats	Title and Extent of recognition
2–108		ASTM F 1905—98 (Reapproved 2003) Standard Practice For Selecting Tests for Determining the Propensity of Materials to Cause Immunotoxicity	Title and Extent of recognition
2–114		ASTM F 1877—05 Standard Practice for Characterization of Particles	Extent of recognition
2–115		ASTM F 895—84 (Reapproved 2006) Standard Test Method for Agar Diffusion Cell Culture Screening for Cytotoxicity	Title, Extent of recognition, and Relevant guidance
2–117		ANSI/AAMI/ISO 10993–3:2003 Biological Evaluation of Medical Devices—Part 3: Tests for Genotoxicity, Carcinogenicity, and Reproductive Toxicity	Title, Extent of recognition, and contact person
2–118		ANSI/AAMI/ISO 10993–11:2006 Biological Evaluation of Medical Devices—Part 11: Tests for Systemic Toxicity	Title, Extent of recognition, and Relevant guidance
2–119		ASTM F813–07 Standard Practice for Direct Contact Cell Culture Evaluation of Materials for Medical Devices	Extent of recognition
2–120		ANSI/AAMI/ISO 10993–6:2007 Biological Evaluation of Medical Devices—Part 6: Tests for Local Effects after Implantation	Title and Extent of recognition
2–122		ASTM F 719–81 (Reapproved 2007)$^{\varepsilon}$ Standard Practice for Testing Biomaterials in Rabbits for Primary Skin Irritation	Title, Extent of recognition, and Relevant guidance
2–123		ASTM F 720–81 (Reapproved 2007) Standard Practice for Testing Guinea Pigs for Contact Allergens: Guinea Pig Maximization Test	Title, Extent of recognition, and Relevant guidance
2–124		ASTM F 750–87 (Reapproved 2007)$^{\varepsilon}$ Standard Practice for Evaluating Material Extracts by Systemic Injection in the Mouse	Title, Extent of recognition, and Relevant guidance
2–125		ASTM F749–98 (Reapproved 2007)$^{\varepsilon 1}$ Standard Practice for Evaluating Material Extracts by Intracutaneous Injection in the Rabbit	Title, Extent of recognition, and Relevant guidance
2–126		ASTM F748–06 Standard Practice for Selecting Generic Biological Test Methods for Materials and Devices	Extent of recognition and Relevant guidance
2–133		ASTM F1408–97 (Reapproved 2008) Standard Practice for Subcutaneous Screening Test for Implant Materials	Extent of recognition
2–134		ASTM F2065–00 (Reapproved 2006) Standard Practice for Testing for Alternative Pathway Complement Activation in Serum by Solid Materials	Extent of recognition
2–135		ANSI/ AAMI/ ISO 10993–12:2007 Biological Evaluation of Medical Devices—Part 12: Sample Preparation and Reference Materials	Title, Extent of recognition, and Relevant guidance
2–136		ASTM E1262–88 (Reapproved 2008) Standard Guide for Performance of Chinese Hamster Ovary Cell/Hypoxanthine Guanine Phosphoribosyl Transferase Gene Mutation Assay	Title, Extent of recognition, and Relevant guidance
2–137		ASTM E1263–97 (Reapproved 2008) Standard Guide for Conduct of Micronucleus Assays in Mammalian Bone Marrow Erythrocytes	Extent of recognition
2–138		ASTM E1280–97 (Reapproved 2008) Standard Guide for Performing the Mouse Lymphoma Assay for Mammalian Cell Mutagenicity	Extent of recognition and Relevant guidance
2–139		ASTM E1397–91 (Reapproved 2008) Standard Practice for the *In Vitro* Rat Hepatocyte DNA Repair Assay	Extent of recognition

TABLE 2.—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old Recognition No.	Replacement Recognition No.	Standard	Change
2–140		ASTM E1398–91 (Reapproved 2008) Standard Practice for the *In Vivo* Rat Hepatocyte DNA Repair Assay	Extent of recognition
2–141		ASTM F1984–99 (Reapproved 2008) Standard Practice for Testing for Whole Complement Activation in Serum by Solid Materials	Extent of recognition, Relevant guidance and Contact person
2–142		ASTM F1983–99 (Reapproved 2008) Standard Practice for Assessment of Compatibility of Absorbable/Resorbable Biomaterials for Implant Applications	Extent of recognition
2–143		ASTM F1904–98 (Reapproved 2008) Standard Practice for Testing the Biological Responses to Particles *in vivo*	Extent of recognition
2–144		ASTM F619–03 (Reapproved 2008) Standard Practice for Extraction of Medical Plastics	Extent of recognition and Relevant guidance
2–145		ASTM F1439–03 (Reapproved 2008) Standard Guide for Performance of Lifetime Bioassay for the Tumorigenic Potential of Implant Materials	Extent of recognition
2–146		ASTM F2148–07$^{\varepsilon 1}$ Standard Practice for Evaluation of Delayed Contact Hypersensitivity Using the Murine Local Lymph Node Assay (LLNA)	Extent of recognition and Relevant guidance
2–147		USP 32–NF26 Biological Tests <87> 2009 Biological Reactivity Test, In Vitro—Direct Contact Test	Extent of recognition and Relevant guidance
2–148		USP 32–NF26 Biological Tests <87> Biological Reactivity Test, In Vitro—Elution Test	Extent of recognition and Relevant guidance
2–149		USP 32–NF26 Biological Tests <88> Biological Reactivity Tests, In Vivo, Procedure—Preparation of Sample	Extent of recognition and Relevant guidance
2–150		USP 32–NF26 Biological Tests <88> Biological Reactivity Tests, In Vivo, Classification of Plastics—Intracutaneous Test	Extent of recognition and Relevant guidance
2–151		USP 32–NF26 Biological Tests <88> Biological Reactivity Tests, In Vivo, Classification of Plastics—Systemic Injection Test	Extent of recognition and Relevant guidance
2–152		ISO 10993–10:2002/Amd.1:2006(E) Biological Evaluation of Medical Devices—Part 10: Tests for Irritation and Delayed-Type Hypersensitivity AMENDMENT 1	Extent of recognition and Relevant guidance
B. Cardiology			
3–2	3–72	ANSI/AAMI EC53:1995/(R) 2008 ECG Cables and Leadwires	Withdrawn and replaced with newer version
3–29		IEC 60601–2–30 (1999–12) Medical Electrical Equipment, Part 2: Particular Requirements for the Safety, Including Essential Performance, of Automatic Cycling Non-Invasive Blood Pressure Monitoring Equipment	Withdrawn
3–45	3–73	ANSI/AAMI/ISO EC57:1998/(R)2008 Testing and Reporting Performance Results of Cardiac Rhythm and ST-Segment Measurement Algorithms	Withdrawn and replaced with newer version
3–49	3–74	ASTM F2079–02 (Reapproved 2008) Standard Test Method for Measuring Intrinsic Elastic Recoil of Balloon-Expandable Stents[1]	Withdrawn and replaced with newer version
3–50		AAMI/ANSI DF2–1996 (Revision of ANSI/AAMI DF2–1989) Cardiac Defibrillator Devices	Withdrawn
3–51		AAMI /ANSI DF–39–1993 Automatic External Defibrillators and Remote-Control Defibrillators	Withdrawn
3–53	3–75	ANSI/AAMI SP10:2002/(R)2008 & ANSI/AAMI SP10:2002/A1:2003/(R)2008 & ANSI/AAMI SP10:2002/A2:2006/(R)2008, ANSI/AAMI SP10:2002/(R)2008 & ANSI/AAMI SP10:2002/A1:2003/(R)2008 & ANSI/AAMI SP10:2002/A2:2006/(R)2008 Manual, Electronic, or Automated Sphygmomanometers	Withdrawn and replaced with newer version

TABLE 2.—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old Recognition No.	Replacement Recognition No.	Standard	Change
3–63		ISO 11318:2002 Cardiac Defibrillators—Connector Assembly DF–1 for Implantable Defibrillators—Dimensions and Test Requirements	Contact person
3–67	3–76	ASTM F2129–08 Standard Test Method for Conducting Cyclic Potentiodynamic Polarization Measurements to Determine the Corrosion Susceptibility of Small Implant Devices	Withdrawn and replaced with newer version
3–70		AAMI/ANSI SP10:2002/A1:2003—Amendment 1 to ANSI/AAMI SP10:2002 Manual, Electronic, or Automated Sphygmomanometers	Withdrawn
3–71		AAMI/ANSI SP10:2002/A2:2006—Amendment 2 to ANSI/AAMI SP10:2002 Manual, Electronic, or Automated Sphygmomanometers	Withdrawn
C. Dental/ENT			
4–78	4–180	ISO 9168:2009 Dentistry—Hose Connectors for Air Driven Dental Handpieces	Withdrawn and replaced with newer version
4–87		ADA/ANSI ADA Specification No. 69 - Dental Ceramic:1999	Reaffirmation
4–91		ADA/ANSI ADA Specification No. 80 - Dental Material-Determination of Color Stability:2001	Reaffirmation
4–99	4–181	ISO 4049:2009 Dentistry-Polymer-Based Filling, Restorative and Luting Materials	Withdrawn and replaced with newer version
4–117		ADA/ANSI Specification No. 12 - Denture Base Polymers:2002	Reaffirmation
4–119		ADA/ANSI Specification No. 82 - Dental Reversible/Irreversible Hydrocolloid Impression Material Systems: 1998/Reaffirmed 2003	Reaffirmation
4–120	4–182	ISO 10139–2:2009 Dentistry—Soft Lining Materials for Removable Dentures—Part 2: Materials for Long-Term Use	Withdrawn and replaced with newer version
4–160		ANSI/ASA S3.1–1999 (R 2003) Maximum Permissible Ambient Noise Levels for Audiometric Test Rooms	Reaffirmation
4–161	4–183	ANSI/ASA S3.2–2009 Method for Measuring the Intelligibility of Speech Over Communication Systems	Withdrawn and replaced with newer version
4–164		ANSI/ASA S3.7–1995 (R 2003) Method for Coupler Calibration of Earphones	Reaffirmation
4–166		ANSI/ASA S3.20–1995 (R2003) Bioacoustical Terminology	Reaffirmation
4–167		ANSI/ASA S3.21–2004 Methods for Manual Pure-Tone threshold Audiometry	Reaffirmation
4–168	4–184	ANSI/ASA S3.25–2009 Occluded Ear Simulator	Withdrawn and replaced with newer version
4–174	4–185	ANSI/ASA S3.45–2009 Procedures for Testing Basic Vestibular Function	Withdrawn and replaced with newer version
4–176	4–186	ANSI/ASA S12.2–2008 Criteria for Evaluating Room Noise	Withdrawn and replaced with newer version
D. General			
5–18	5–51	ASTM D–4332–01 (Reapproved 2006) Standard Practice for Conditioning Containers, Packages, or Packaging Components for Testing	Withdrawn and replaced with newer version
5–29		AAMI/ANSI HE74–2001/ Human Factors Design Process for Medical Devices	Reaffirmation
E. In Vitro Diagnostics			
7–35	7–205	CLSI H47–A2 One-Stage Prothrombin Time (PT) Test and Activated Partial Thromboplastin Time (APTT) Test	Withdrawn and replaced with newer version

TABLE 2.—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old Recognition No.	Replacement Recognition No.	Standard	Change
7–42	7–206	CLSI I/LA20–A2 Analytical Performance Characteristics and Clinical Utility of Immunological Assays for Human Immunoglobulin E (IgE) Antibodies and Defined Allergen Specificities	Withdrawn and replaced with newer version
7–97	7–207	CLSI GP16–A3 Urinalysis	Withdrawn and replaced with newer version
7–187	7–208	CLSI M44–S2 Zone Diameter Interpretive Standards, Corresponding Minimal Inhibitory Concentration (MIC) Interpretive Breakpoints, and Quality Control Limits for Antifungal Disk Diffusion Susceptibility Testing of Yeasts	Withdrawn and replaced with newer version
7–37		NCCLS I/LA06–A Detection and Quantitation of Rubella IgG Antibody: Evaluation and Performance Criteria for Multiple Component Test Products, Specimen Handling, and Use of Test Products in the Clinical Laboratory	Withdrawn
F. Materials			
8–104	8–189	ASTM F 1108—04 (Reapproved 2009) Standard Specification for Titanium-6Aluminum-4Vanadium Alloy Castings for Surgical Implants (UNS R56406)	Withdrawn and replaced with newer version
8–145	8–190	ASTM F 90–09 Standard Specification for Wrought Cobalt-20Chromium-15Tungsten-10Nickel Alloy for Surgical Implant Applications (UNS R30605)	Withdrawn and replaced with newer version
G. Physical Medicine			
16–19	16–162	ISO 7176–4:2008 Wheelchairs—Part 4: Energy Consumption of Electric Wheelchairs and Scooters for Determination of Theoretical Distance Range	Withdrawn and replaced with newer version
16–20	16–163	ISO 7176–5:2008 Wheelchairs—Part 5: Determination of Dimensions, Mass and Manoeuvring Space	Withdrawn and replaced with newer version
16–23	16–164	ISO 7176–10:2008 Wheelchairs—Part 10: Determination of Obstacle-Climbing Ability of Electrically Powered Wheelchairs	Withdrawn and replaced with newer version
16–26	16–165	ISO 7176–14:2008 Wheelchairs—Part 14 Power and Control Systems for Electrically Powered Wheelchairs and Scooters—Requirements and Test Methods	Withdrawn and replaced with newer version
H. Sterility			
14–117		ANSI/AAMI ST35:2003 Handling and Biological Decontamination of Reusable Medical Devices in Health Care Facilities and in Nonclinical Settings	Withdrawn
14–263	14–280	ANSI/AAMI ST79:2006 and A1:2008, A2:2009 (Consolidated Text) Comprehensive Guide to Steam Sterilization and Sterility Assurance in Health Care Facilities	Withdrawn and replaced with newer version
14–256	14–286	ASTM F2095–07e1 Standard Test Methods for Pressure Decay Leak Test for Flexible Packages With and Without Restraining Plates	Withdrawn and replaced with newer version
14–255	14–281	ASTM F17–08 Standard Terminology Relating to Flexible Barrier Packaging[1]	Withdrawn and replaced with newer version
14–245	14–282	ASTM F2338–09 Standard Test Method for Nondestructive Detection of Leaks in Packages by Vacuum Decay Method[1]	Withdrawn and replaced with newer version
14–237	14–283	ASTM F 88/F 88M—09 Standard Test Method for Seal Strength of Flexible Barrier Materials[1]	Withdrawn and replaced with newer version
14–199	14–284	ASTM D4169–08 Standard Practice for Performance Testing of Shipping Containers and Systems[1]	Withdrawn and replaced with newer version
14–228		ANSI/AAMI/ISO 11135–1:2007 Sterilization of Health Care Products - Ethylene oxide - Part 1: Requirements for Development, Validation, and Routine Control of a Sterilization Process for Medical Devices	Guidance

TABLE 2.—MODIFICATIONS TO THE LIST OF RECOGNIZED STANDARDS—Continued

Old Recognition No.	Replacement Recognition No.	Standard	Change
14–70	14–285	ANSI/AAMI/ISO 14161:2009 Sterilization of Health Care Products - Biological Indicators - Guidance for the Selection, Use and Interpretation of Results	Withdrawn and replaced with newer version
I. Tissue Engineering			
15–6	15–16	ASTM F2450–09 Standard Guide for Assessing Microstructure of Polymeric Scaffolds for Use in Tissue Engineered Medical Products[1]	Withdrawn and replaced with newer version
15–9	15–17	ASTM F2311–08 Standard Guide for Classification of Therapeutic Skin Substitutes[1]	Withdrawn and replaced with newer version
15–13	15–18	ASTM F2212–09 Standard Guide for Characterization of Type I Collagen as Starting Material for Surgical Implants and Substrates for Tissue Engineered Medical Products (TEMPs)[1]	Withdrawn and replaced with newer version

III. Listing of New Entries

In table 3 of this document, FDA provides the listing of new entries and consensus standards added as modifications to the list of recognized standards under Recognition List Number: 023.

TABLE 3.—NEW ENTRIES TO THE LIST OF RECOGNIZED STANDARDS

Recognition No.	Title of Standard	Reference No. & Date
A. Cardiology		
3–77	Active Implantable Medical Devices—Electromagnetic Compatibility—EMC Test Protocols for Implantable Cardiac Pacemakers and Implantable Cardioverter Defibrillators	ANSI/AAMI PC69:2007
B. In Vitro Diagnostics		
7–209	Performance Metrics for Continuous Interstitial Glucose Monitoring	POCT 05–A
C. Orthopedics		
11–219	Standard Specification for Polyetheretherketone (PEEK) Polymers for Surgical Implant Applications	ASTM F 2026–08
D. Physical Medicine		
16–166	Wheelchairs—Requirements and Test Methods for Electromagnetic Compatibility of Electrically Powered Wheelchairs and Scooters, and Battery Chargers	ISO 7176–21:2009
E. Sterility		
14–286	Processing of Reusable Surgical Textiles for Use in Health Care Facilities	ANSI/AAMI ST65:2008

IV. List of Recognized Standards

FDA maintains the agency's current list of FDA recognized consensus standards in a searchable database that may be accessed directly at FDA's Internet site at *http://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cfStandards/search.cfm*. FDA will incorporate the modifications and minor revisions described in this notice into the database and, upon publication in the **Federal Register**, this recognition of consensus standards will be effective. FDA will announce additional modifications and minor revisions to the list of recognized consensus standards, as needed, in the **Federal Register** once a year, or more often, if necessary.

V. Recommendation of Standards for Recognition by FDA

Any person may recommend consensus standards as candidates for recognition under the new provision of section 514 of the act by submitting such recommendations, with reasons for the recommendation, to the contact person (See **FOR FURTHER INFORMATION CONTACT**). To be properly considered such recommendations should contain, at a minimum, the following information: (1) title of the standard; (2) any reference number and date; (3) name and address of the national or international standards development organization; (4) a proposed list of devices for which a declaration of conformity to this standard should routinely apply; and (5) a brief identification of the testing or performance or other characteristics of the devices that would be addressed by a declaration of conformity.

VI. Electronic Access

You may obtain a copy of "Guidance on the Recognition and Use of Consensus Standards" by using the Internet. CDRH maintains a site on the Internet for easy access to information including text, graphics, and files that you may download to a personal

computer with access to the Internet. Updated on a regular basis, the CDRH home page includes the guidance as well as the current list of recognized standards and other standards related documents. After publication in the **Federal Register**, this notice announcing "Modification to the List of Recognized Standards, Recognition List Number: 023" will be available on the CDRH home page. You may access the CDRH home page at *http://www.fda.gov/cdrh*.

You may access "Guidance on the Recognition and Use of Consensus Standards," and the searchable database for "FDA Recognized Consensus Standards" through the hyperlink at *http://www.fda.gov/cdrh/stdsprog.html*.

This **Federal Register** document on modifications in FDA's recognition of consensus standards is available at *http://www.fda.gov/cdrh/fedregin.html*.

VII. Submission of Comments and Effective Date

Interested persons may submit to the contact person (see **FOR FURTHER INFORMATION CONTACT**) written or electronic comments regarding this document. Two copies of any mailed comments are to be submitted, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. FDA will consider any comments received in determining whether to amend the current listing of modifications to the list of recognized standards, Recognition List Number: 023. These modifications to the list or recognized standards are effective upon publication of this notice in the **Federal Register**.

Dated: April 30, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–10562 Filed 5–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2009–D–0052]

Guidance for Industry on Documenting Statistical Analysis Programs and Data Files; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a guidance for industry #197 entitled "Documenting Statistical Analysis Programs and Data Files." This guidance is provided to inform study statisticians of recommendations for documenting statistical analyses and data files submitted to the Center for Veterinary Medicine (CVM) for the evaluation of safety and effectiveness in new animal drug applications. These recommendations are intended to encompass the most complex data submissions to CVM, to reduce the number of revisions that may be required for CVM to effectively review statistical analyses and to simplify submission preparation by providing a uniform documentation system.

DATES: Submit written or electronic comments on agency guidances at any time.

ADDRESSES: Submit written requests for single copies of the guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests.

Submit written comments on the guidance to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the guidance document.

FOR FURTHER INFORMATION CONTACT: Anna Nevius, Center for Veterinary Medicine (HFV–163), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 240–276–8170, *anna.nevius@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of March 16, 2009 (74 FR 11118), FDA published the notice of availability for a draft guidance entitled "Draft Guidance for Industry on Documenting Statistical Analysis Programs and Data Files; Availability" giving interested persons until June 1, 2009, to comment on the draft guidance. FDA received no comments on the draft guidance. Minor editorial changes were made to improve clarity. The guidance announced in this notice finalizes the draft guidance dated April 27, 2009.

II. Significance of Guidance

This level 1 guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the agency's current thinking on the topic. It does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statutes and regulations.

III. Paperwork Reduction Act of 1995

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in 21 CFR part 514 have been approved under OMB control no. 0910–0032.

IV. Comments

Submit written requests for single copies of the guidance to the Communications Staff (HFV–12), Center for Veterinary Medicine, Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855. Send one self-addressed adhesive label to assist that office in processing your requests.

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) written or electronic comments regarding this document. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

V. Electronic Access

Persons with access to the Internet may obtain the guidance at either *http://www.fda.gov/AnimalVeterinary/default.htm* or *http://www.regulations.gov*.

Dated: April 29, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–10582 Filed 5–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0224]

Town Hall Discussion With the Director of the Center for Devices and Radiological Health and Other Senior Center Management

AGENCY: Food and Drug Administration, HHS

ACTION: Notice of public meeting; request for comments.

The Food and Drug Administration (FDA) is announcing a public meeting entitled "Town Hall Discussion With the Director of the Center for Devices and Radiological Health and Other Senior Center Management." The purpose of this meeting is to present the Center for Devices and Radiological Health (CDRH) fiscal year (FY) 2010 priorities. In addition, FDA is interested in engaging in discussions about issues that are of importance to the medical device industry.

Date and Time: The public meeting will be held on June 22, 2010, from 9 a.m. to 5 p.m.

Location: The public meeting will be held at the Hilton Boston/Woburn, Two Forbes Rd., Woburn, MA 01801. The meeting will not be videotaped or Web cast.

Contact: Heather Howell, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 4320, Silver Spring, MD 20993, 301–796–5718, e-mail: *heather.howell@fda.hhs.gov*.

Registration and Requests for Oral Presentations: If you wish to attend the public meeting, you must register online at: *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/ucm206671.htm*. Provide complete contact information for each attendee, including name, title, company or organization, address, e-mail, and telephone number. Registration requests must be received by 5 p.m. on Wednesday, June 9, 2010.

If you wish to make an oral presentation during any of the sessions at the meeting (see section II of this document), you must indicate this at the time of registration. FDA will do its best to accommodate requests to speak. Individuals and organizations with common interests are urged to consolidate or coordinate their presentations, and to request time for a joint presentation. FDA will determine the amount of time allotted to each presenter and the approximate time that each oral presentation is scheduled to begin.

Registration is free and will be on a first-come, first-served basis. Early registration is recommended because seating is limited. FDA may limit the number of participants from each organization based on space limitations. Registrants will receive confirmation once they have been accepted. Onsite registration on the day of the public meeting will be provided on a space-available basis beginning at 8 a.m.

If you need special accommodations due to a disability, please contact Susan Monahan at 301–796–5661 or e-mail: *susan.monahan@fda.hhs.gov* at least 7 days in advance of the meeting.

Comments: FDA is holding this public meeting to share information and discuss issues of importance to the medical device industry. CDRH is specifically interested in addressing the following question: What mechanism(s) would you prefer or suggest for FDA to engage with industry? The deadline for responding to this question and for submitting other comments related to this public meeting is Wednesday, June 9, 2010.

Regardless of attendance at the public meeting, interested persons may submit written or electronic comments. Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to *http://www.regulations.gov*. Submit a single copy of electronic comments or two paper copies of any mailed comments, except that individuals may submit one paper copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

SUPPLEMENTARY INFORMATION:

I. Background

CDRH has announced four priority areas of activity for FY 2010, each of which presents significant opportunities to improve CDRH's effectiveness in fulfilling our public health mission. More information, including specific goals and actions associated with each priority, is available under "CDRH Strategic Planning" at *http://www.fda.gov/AboutFDA/CentersOffices/CDRH*.

II. Public Meeting

The objective of this public meeting is to present CDRH's FY 2010 priorities. In addition, FDA is interested in engaging in discussions about issues that are of importance to the medical device industry. CDRH wishes to obtain feedback/ideas for facilitating two-way communication between CDRH and the medical device industry.

The meeting will open with an introduction of CDRH Senior Staff in attendance. Following introductions, Dr. Jeffrey Shuren, the Director of CDRH, will present the FY 2010 CDRH priorities. Industry representatives and other members of the public will then be given the opportunity to present comments to CDRH Senior Staff. Attendees from CDRH may respond to questions presented by industry and other members of the public.

In advance of the meeting, additional information, including a meeting agenda with a speakers' schedule, will be made available on the Internet. This information will be placed on file in the public docket (docket number found in brackets in the heading of this document), which is available at *http://www.regulations.gov*. This information will also be available at *http://www.fda.gov/MedicalDevices/NewsEvents/WorkshopsConferences/default.htm* (select the appropriate meeting from the list).

III. Transcripts

Please be advised that as soon as a transcript is available, it will be accessible at *http://www.regulations.gov*. It may be viewed at the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD. A transcript will also be available in either hardcopy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to Division of Freedom of Information (HFI–35), Office of Management Programs, Food and Drug Administration, 5600 Fishers Lane, rm. 6–30, Rockville, MD 20857.

Dated: April 30, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–10563 Filed 5–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0002]

Withdrawal of Approval of New Animal Drug Applications; Coumaphos; Novobiocin; Buquinolate and Lincomycin

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of three new animal drug applications (NADAs). In a final rule published elsewhere in this issue of the **Federal Register**, FDA is amending the animal drug regulations to remove portions reflecting approval of the single NADA of the three that is codified.

DATES: Withdrawal of approval is effective May 17, 2010.

FOR FURTHER INFORMATION CONTACT: John Bartkowiak, Center for Veterinary Medicine (HFV–212), Food and Drug Administration, 7519 Standish Pl., Rockville, MD 20855, 240–276–9079, e–mail: *john.bartkowiak@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: The following sponsors have requested that FDA withdraw approval of the three NADAs listed in Table 1:

TABLE 1.

Sponsor	NADA No./Product (Established Name of Drug)	21 CFR Cite (Sponsor's Drug Labeler Code)
Pharmacia & Upjohn Co., a Division of Pfizer, Inc., 235 East 42d St., New York, NY 10017	NADA 13–467/ALBAMIX Susceptibility Disks (novobiocin)	Not codified
Pharmacia & Upjohn Co., a Division of Pfizer, Inc., 235 East 42d St., New York, NY 10017	NADA 45–738/LINCOMIX/BONAID (lincomycin/buquinolate)	Not codified
Purina Mills, Inc., P.O. Box 66812, St. Louis, MO 63166–6812	NADA 42–117/Purina 6 Day Worm-Kill Concentrate (coumaphos)	558.185 (017800)

Therefore, under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, and in accordance with § 514.116 *Notice of withdrawal of approval of application* (21 CFR 514.116), notice is given that approval of NADAs 13–467, 42–117, and 45–738, and all supplements and amendments thereto, is hereby withdrawn, effective May 17, 2010.

In a final rule published elsewhere in this issue of the **Federal Register**, FDA is amending the animal drug regulations to reflect the withdrawal of approval of NADA 42–117.

Dated: April 30, 2010.

Bernadette Dunham,

Director, Center for Veterinary Medicine.

[FR Doc. 2010–10567 Filed 5–4–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF HOMELAND SECURITY

United States Immigration and Customs Enforcement

Agency Information Collection Activities: Extension of an Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection for Review; Form I–333, Obligor Change of Address.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (USICE), has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until July 6, 2010.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), Joseph M. Gerhart, Chief, Records Management Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., Room 3138, Washington, DC 20536; (202) 732–6337.

Comments are encouraged and will be accepted for sixty days until July 6, 2010. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Obligor Change of Address.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form I–333, U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individual or Households, Business or other non-profit. The information collected on the Form I–333 is necessary for U.S. Immigration and Customs Enforcement (ICE) to provide immigration bond obligors a standardized method to notify ICE of address updates. Upon receipt of the formatted information records will then be updated to ensure accurate service of correspondence between ICE and the obligor.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 12,000 responses at 15 minutes (.25 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 3,000 annual burden hours.

Requests for a copy of the proposed information collection instrument, with instructions; or inquiries for additional information should be requested via e-mail to: *forms.ice@dhs.gov* with "ICE Form I–333" in the subject line.

Dated: April 28, 2010.

Joseph M. Gerhart,

Branch Chief, Records Management Branch, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. 2010–10546 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

United States Immigration and Customs Enforcement

Agency Information Collection Activities: Extension of an Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection for Review; National Security Entry-Exit Registration System (NSEERS); OMB Control No. 1653–0036.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (USICE), will be submitting the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until July 6, 2010.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), Joseph M. Gerhart, Chief, Records Management Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., Room 3138, Washington, DC 20024; (202) 732–6337.

Comments are encouraged and will be accepted for sixty days until July 6, 2010. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* National Security Entry-Exit Registration System (NSEERS)

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals and Households. This information collection requires certain nonimmigrant aliens to make specific reports to USICE upon arrival, approximately 30 days after arrival, every 12 months after arrival; upon certain events, such as change of address, employment or school; and at the time they leave the United States.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 58,000 responses at 30 minutes (0.50 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 29,000 annual burden hours

Requests for additional information should be requested via e-mail to: *forms.ice@dhs.gov* with "NSEERS" in the subject line.

Dated: April 28, 2010.

Joseph M. Gerhart,

Chief, Records Management Branch, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. 2010–10545 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

United States Immigration and Customs Enforcement

Agency Information Collection Activities: Extension of an Existing Information Collection; Comment Request

ACTION: 60-Day Notice of Information Collection for Review; Form G–146, Nonimmigrant Checkout Letter; OMB Control No. 1653–0020.

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (USICE), has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted for sixty days until July 6, 2010.

Written comments and suggestions regarding items contained in this notice, and especially with regard to the estimated public burden and associated response time should be directed to the Department of Homeland Security (DHS), Joseph M. Gerhart, Chief, Records Management Branch, U.S. Immigration and Customs Enforcement, 500 12th Street, SW., Room 3138, Washington, DC 20536; (202) 732–6337.

Comments are encouraged and will be accepted for sixty days until July 6, 2010. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Overview of this information collection:

(1) *Type of Information Collection:* Extension of a currently approved information collection.

(2) *Title of the Form/Collection:* Nonimmigrant Checkout Letter.

(3) *Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection:* Form G–146, U.S. Immigration and Customs Enforcement.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individual or Households. When an alien (other than one that is required to depart under safeguards) is granted the privilege of voluntary departure without an issuance of an Order to Show Cause, a control card is prepared. If after a certain period of time, a verification of departure is not received, actions are taken to locate the alien or ascertain his or her

whereabouts. The ICE form G–146 is used to inquire of persons in the U.S. or abroad regarding the whereabouts of the alien.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 20,000 responses at 10 minutes (.166 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 3,320 annual burden hours.

Requests for a copy of the proposed information collection instrument, with instructions; or inquiries for additional information should be requested via e-mail to: *forms.ice@dhs.gov* with "ICE Form G–146" in the subject line.

Dated: April 28, 2010.

Joseph M. Gerhart,

Branch Chief, Records Management Branch, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. 2010–10542 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–28–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2009–0001]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, OMB No. 1660–0080; Application for Surplus Federal Real Property Public Benefit Conveyance and BRAC Program for Emergency Management Use

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 30-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0080; FEMA Form 119–0–1 (replaces 60–25), Surplus Federal Real Property Application for Public Benefit Conveyance.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before June 4, 2010.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or e-mail address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: Application for Surplus Federal Real Property Public Benefit Conveyance and BRAC Program for Emergency Management Use.

Type of information collection: Revision of a currently approved information collection.

OMB Number: 1660–0080.

Form Titles and Numbers: FEMA Form 119–0–1 (replaces 60–25), Surplus Federal Real Property Application for Public Benefit Conveyance.

Abstract: Use of the Application for Surplus Federal Real Property Public Benefit Conveyance and Base Realignment and Closure (BRAC) Program for Emergency Management Use is necessary to implement the processes and procedures for the successful, lawful, and expeditious conveyance of real property from the Federal Government to public entities such as State, local, county, city, town, or other like government bodies, as it relates to emergency management response purposes, including fire and rescue services. Utilization of this application will ensure that properties will be fully positioned for use at their highest and best potentials as required by GSA and Department of Defense regulations, public law, Executive Orders, and the Code of Federal Regulations.

Affected Public: State, local, or Tribal Government.

Estimated Number of Respondents: 100.

Frequency of Response: On occasion.

Estimated Average Hour Burden per Respondent: 2.5 Hours.

Estimated Total Annual Burden Hours: 250 hours.

Estimated Cost: There are no record keeping, capital, start-up or maintenance costs associated with this information collection.

Dated: April 28, 2010.

Samuel C. Smith,

Acting Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–10530 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–19–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2009–0001]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, OMB No. 1660–0100; General Admissions Application (Long and Short) and Stipend Forms

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 30-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0100; FEMA Forms 119–25–1 (replaces FEMA Form 75–5), General Admissions Application; 119–25–2 (replaces FEMA Form 75–5a), General Admissions Application Short-Form; 119–25–3 (replaces FEMA Form 75–3), Student Stipend Agreement; and 119–25–4 (replaces FEMA For 75–3a), Student Stipend Agreement (Amendment); FEMA Form 119–25–5 (replaces FEMA Form 95–22) National Fire Academy Executive Fire Officer Program Application Admission.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before June 4, 2010.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer

for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or e-mail address *FEMA–Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: General Admissions Application (Long and Short) and Stipend Forms.

Type of information collection: Revision of a currently approved information collection.

OMB Number: 1660–0100.

Form Titles and Numbers: FEMA Forms 119–25–1 (replaces FEMA Form 75–5), General Admissions Application; 119–25–2 (replaces FEMA Form 75–5a), General Admissions Application Short-Form; 119–25–3 (replaces FEMA Form 75–3), Student Stipend Agreement; and 119–25–4 (replaces FEMA For 75–3a), Student Stipend Agreement (Amendment); FEMA Form 119–25–5 (replaces FEMA Form 95–22) National Fire Academy Executive Fire Officer Program Application Admission. The form numbers have changed since publication of the 60-day Federal Register Notice at 75 FR 8386, February 24, 2010.

Abstract: FEMA personnel use the application forms to admit applicants to courses and programs offered at National Emergency Training Center (NETC), the Noble Training Facility (NTF), and various locations throughout the United States. The FEMA Form 119–25–1, General Admissions Application is the regular form and FEMA Form 119–25–2 is the short form used when FEMA personnel are not required to determine eligibility for courses and programs. FEMA Form 119–25–5 and the requested supporting documentation Letter of Intent, Resume, Letter of Recommendation, Diploma Photocopy, and Organizational Chart is used to select applicants to the Executive Fire Officer Program. FEMA Forms 119–25–3 and 119–25–4, Student Stipend Agreement and Student Stipend Agreement (Amendment), respectively, are provided to individuals who have been accepted to attend certain courses for which a stipend is paid. The 119–25–4 form is used when there is a supplemental reimbursement request for expenses that occur after arrival at the training site.

Affected Public: Individuals or households; Businesses or other for-profit; State, Local or Tribal Government; Not-for-profit institutions; Federal Government.

Estimated Number of Respondents: 109,800.

Frequency of Response: On Occasion.

Estimated Average Hour Burden per Respondent: .11 Hours.

Estimated Total Annual Burden Hours: 12,350 Hours.

Estimated Cost: There is no annual operation, maintenance, capital or start-up cost associated with this collection.

Dated: April 28, 2010.

Samuel C. Smith,

Acting Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–10529 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–45–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2010–0027]

Agency Information Collection Activities: Proposed Collection; Comment Request, 1660–0037; Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 60-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0037; FEMA Form 086–0–22, Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps; FEMA Form 086–0–22A, Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps (Spanish).

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this Notice seeks comments concerning information required by the Federal Emergency Management Agency to amend or revise National Flood Insurance Program Maps to remove certain property from the 1-percent annual chance floodplain.

DATES: Comments must be submitted on or before July 6, 2010.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *http://www.regulations.gov* under docket ID FEMA–2010–0027. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Office of Chief Counsel, Regulation and Policy Team, DHS/FEMA, 500 C Street, SW., Room 835, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *E-mail.* Submit comments to *FEMA–POLICY@dhs.gov*. Include docket ID FEMA–2010–0027 in the subject line.

All submissions received must include the agency name and docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available on the Privacy and Use Notice link on the Administration Navigation Bar of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Todd Steiner, Program Specialist, Mitigation Directorate, Risk Analysis Division, FEMA at (202) 646–7097 for additional information. You may contact the Records Management Division for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA–Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION: With the passage of the Flood Disaster Protection Act of 1973, an owner of a structure, with a federally backed mortgage, located in the 1-percent annual chance floodplain, was required to purchase Federal flood insurance. This was in response to the escalating damage caused by flooding and the unavailability of flood insurance from commercial insurance companies. As part of this effort, FEMA mapped the 1-percent annual chance floodplain in communities. However, due to scale limitations, individual structures that may be above the base flood cannot

always be shown as being out of the 1-percent annual chance floodplain. Title 44 CFR parts 65 and 70 provide for a mechanism to request a review and also indicate the requirements necessary to apply for a reassessment of this determination. FEMA will issue a Letter of Map Amendment (LOMA) to waive the Federal requirement for flood insurance when data is submitted to show that the property or structure is at or above the elevation of the base flood.

Collection of Information

Title: Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: OMB No. 1660–0037.

Form Titles and Numbers: FEMA Form 086–0–22, Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps; FEMA Form 086–0–22A, Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps (Spanish).

Abstract: FEMA Forms 086–0–22 and 086–0–22A are designed to assist respondents in gathering information that FEMA needs to determine whether a certain single-lot property or structure is likely to be flooded during a flood event that has a 1-percent annual chance of being equaled or exceeded in any given year (base flood).

Affected Public: Individuals or households; Business or other for profit institutions.

Estimated Total Annual Burden Hours: 45,060 hours.

ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/ form number	Number of respondents	Number of responses per respondent	Total number of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate	Total annual respondent cost
Homeowner	Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps/ FEMA Form 086–0–22.	16,428	1	16,428	1.2	19,714	$21.80	$429,765
Homeowner	Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps (Spanish)/ FEMA Form 086–0–22A.	2,347	1	2,347	1.2	2,816	21.80	61,389
Subtotal ...	.....	18,775	.....	18,775	.....	22,530	.....	491,154

ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS—Continued

Type of respondent	Form name/ form number	Number of respondents	Number of responses per respondent	Total number of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate	Total annual respondent cost
Surveyor	Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps/ FEMA Form 086–0–22.	11,500	1	11,500	1.2	13,800	35.66	492,108
Surveyor	Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps (Spanish)/ FEMA Form 086–0–22A.	1,643	1	1,643	1.2	1,972	35.66	70,322
Subtotal ...	.....	13,143	.....	13,143	.....	15,772	.....	562,430
Engineer	Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps/ FEMA Form 086–0–22.	4,928	1	4,928	1.2	5,913	50.22	297,001

ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS—Continued

Type of respondent	Form name/ form number	Number of respondents	Number of responses per respondent	Total number of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate	Total annual respondent cost
Engineer	Application Form for Single Residential Lot or Structure Amendments to National Flood Insurance Program Maps (Spanish)/ FEMA Form 086–0–22A.	704	1	704	1.2	845	50.22	42,436
Subtotal ...	.....	5,632	.....	5,632	.....	6,758	.....	339,437
Total	.....	18,775	.....	32,856	.....	45,060	.....	1,393,021

Estimated Cost: There are no start-up, capital, operational, or maintenance costs for this collection.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Dated: April 29, 2010.

Samuel C. Smith,

Acting Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–10528 Filed 5–4–10; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2010–0015]

Agency Information Collection Activities: Proposed Collection; Comment Request, 1660–0086; National Flood Insurance Program—Mortgage Portfolio Protection Program (MPPP)

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 60-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0086; No Form.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this Notice seeks comments concerning the Mortgage Portfolio Protection Program, which assists the mortgage lending and servicing industries bring their mortgage portfolios into compliance with Federal flood insurance requirements.

DATES: Comments must be submitted on or before July 6, 2010.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *http://www.regulations.gov* under Docket ID FEMA–2010–0015. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Office of Chief Counsel, Regulation and Policy Team, DHS/FEMA, 500 C Street, SW., Room 835, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *E-mail.* Submit comments to *FEMA–POLICY@dhs.gov*. Include Docket ID FEMA–2010–0015 in the subject line.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via the Notice link in the footer of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Susan Bernstein, Program Analyst, FEMA Mitigation Division, (202) 212–2113 for additional information. You may contact the Records Management Division for copies of the proposed collection of

information at facsimile number (202) 646–3347 or e-mail address: *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP) is authorized in Public Law 90–448 (1968) and expanded by Public Law 93–234 (1973), and is codified as 42 U.S.C. 4001, *et seq.* Public Law 103–325 (1994) expands upon this and provides federally supported flood insurance for existing buildings exposed to flood risk. In accordance with Public Law 93–234, the purchase of flood insurance is mandatory when Federal or federally related financial assistance is being provided for acquisition of flood hazard areas of communities that are participating in the program. The Mortgage Portfolio Protection program (MPPP) is an option that companies participating in the NFIP can use to bring their mortgage loan portfolios into compliance with the flood insurance purchase requirements of the three public laws described previously. Title 44 CFR 62.23(l)(1), with 44 CFR Appendix A to Part 62 implements the MPPP requirements for specific notices and other procedures that must be adhered to. Title 44 CFR 62.23(l)(2) indicates that Write-Your-Own (WYO) Companies participating in the MPPP must provide a detailed implementation package, known as the Mortgage Portfolio Protection Program Agreement, to any lending institutions that are requesting insurance coverage and the lender must acknowledge receipt.

Collection of Information

Title: National Flood Insurance Program—Mortgage Portfolio Protection Program (MPPP).

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0086.

Form Titles and Numbers: No Form.

Abstract: A WYO Company that wishes to participate in the MPPP must review the information listed in the Mortgage Portfolio Protection Program Agreement and complete the acknowledgement either agreeing to participate in the MPPP or electing to continue under just the WYO guidelines. This acknowledgment is used to determine which WYO Companies will be writing insurance under the Mortgage Portfolio Protection Program and which ones choose only to sell flood insurance through the regular WYO Program. A lender wishing to obtain flood insurance through an MPPP participating insurance company must review the Financial Assistance/Subsidy Arrangement and acknowledge the terms by signing the notice of acceptance provided with the Arrangement. This acceptance is used to verify that the lender understands the terms of the agreement so that they can properly apply for flood insurance.

Affected Public: Business or other for-profit.

Estimated Total Annual Burden Hours: 170.5 Hours.

TABLE A.12—ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/form No.	Number of respondents	Number of responses per respondent	Total number of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate	Total annual respondent cost
Business or other for-profit.	Mortgage Portfolio Protection Program Agreement Notice of Acceptance (Formerly Lender/Mortgagor Service Coordination) New Entrant/No Form.	91	1	91	.5	45.5	$40.68	$1,851
Business or other for-profit.	Financial Assistance/Subsidy Arrangement Receipt for Materials/No Form.	250	1	250	.5	125	43.75	5,434

Estimated Cost: There are no recordkeeping, capital, start-up or maintenance costs associated with this information collection.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to: (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Dated: April 28, 2010.

Samuel C. Smith,

Acting Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–10527 Filed 5–4–10; 8:45 am]

BILLING CODE 9110–11–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2010–0016]

Agency Information Collection Activities: Proposed Collection; Comment Request, 1660–0005; National Flood Insurance Program—Claim Forms

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 60-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0005; FEMA Form 086–0–6 (formerly 81–40) National Flood Insurance Program Worksheet-Contents-Personal Property; 086–0–7 (formerly 81–41) Worksheet—Building; 086–0–8 (formerly 81–41A) Worksheet—Building (Continued); 086–0–9 (formerly 81–42) Proof of Loss; 086–0–10 (formerly 81–42A) Increased Cost of Compliance Proof of Loss; 086–0–11 (formerly 81–43) Notice of Loss; 086–0–12 (formerly 81–44) Statement as to Full Cost of Repair or Replacement under the Replacement Cost Coverage, Subject to the Terms and Conditions of this Policy; 086–0–13 (formerly 81–57) National Flood Insurance Program Preliminary Report; 086–0–14 (formerly 81–58) National Flood Insurance Program Final Report; 086–0–15 (formerly 81–59) National Flood Insurance Program Narrative Report; 086–0–16 (formerly 81–63) Cause of Loss and Subrogation Report; 086–0–17 (formerly 81–96) Manufactured (Mobile) Home/Travel Trailer Worksheet; 086–0–18 (formerly 81–96A) Manufactured (Mobile) Home/Travel Trailer Worksheet (Continued); 086–0–19 (formerly 81–98) Increased Cost of Compliance (ICC) Adjuster Report; 086–0–20 (formerly 81–109) Adjuster Preliminary Damage Assessment; 086–0–21(formerly 81–110) Adjuster Certification Application.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this Notice seeks comments concerning the collection of information related to the flood insurance claims process.

DATES: Comments must be submitted on or before July 6, 2010.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *http://www.regulations.gov* under Docket ID FEMA–2010–0016. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Office of Chief Counsel, Regulation and Policy Team, DHS/FEMA, 500 C Street, SW., Room 835, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *E-mail.* Submit comments to *FEMA-POLICY@dhs.gov.* Include Docket ID FEMA–2010–0016 in the subject line.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available on the Privacy and Use Notice link on the Administration Navigation Bar of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Donald Waters, Insurance Examiner, FEMA 202–212–4725 for additional information. You may contact the Records Management Division for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP) is codified at 42 U.S.C. 4001, *et seq.* and is authorized by Public Law 90–448 (1968) and expanded by Public Law 93–234 (1973). The National Flood Insurance Act of 1968 requires that the Federal Emergency Management Agency (FEMA) provide flood insurance at full actuarial rates reflecting the complete flood risk to structures built or substantially improved on or after the effective date for the initial Flood Insurance Rate Map (FIRM) for the community, or after December 31, 1974, whichever is later, so that the risk associated with buildings in flood-prone areas are borne by those located in such areas and not by the taxpayers at large. In accordance with Public Law 93–234, the purchase of flood insurance is mandatory when Federal or federally related financial assistance is being provided for acquisition or construction of buildings located, or to be located, within FEMA-identified special flood hazard areas of communities that are participating in the NFIP. When flood damage occurs to insured property, information is collected to report, investigate, negotiate, and settle the claim.

Collection of Information

Title: National Flood Insurance Program—Claim Forms.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0005.

Form Titles and Numbers: FEMA Form 086–0–6 (formerly 81–40) National Flood Insurance Program Worksheet-Contents-Personal Property; 086–0–7 (formerly 81–41) Worksheet—Building; 086–0–8 (formerly 81–41A) Worksheet—Building (Continued); 086–0–9 (formerly 81–42) Proof of Loss; 086–0–10 (formerly 81–42A) Increased Cost of Compliance Proof of Loss; 086–0–11 (formerly 81–43) Notice of Loss; 086–0–12 (formerly 81–44) Statement as to Full Cost of Repair or Replacement under the Replacement Cost Coverage, Subject to the Terms and Conditions of this Policy; 086–0–13 (formerly 81–57) National Flood Insurance Program Preliminary Report; 086–0–14 (formerly 81–58) National Flood Insurance Program Final Report; 086–0–15 (formerly 81–59) National Flood Insurance Program Narrative Report; 086–0–16 (formerly 81–63) Cause of Loss and Subrogation Report; 086–0–17 (formerly 81–96) Manufactured (Mobile) Home/Travel Trailer Worksheet; 086–0–18 (formerly 81–96A) Manufactured (Mobile) Home/Travel Trailer Worksheet (Continued); 086–0–19 (formerly 81–98) Increased Cost of Compliance (ICC) Adjuster Report; 086–0–20 (formerly 81–109) Adjuster Preliminary Damage Assessment; 086–0–21(formerly 81–110) Adjuster Certification Application.

Abstract: The claims forms used for the National Flood Insurance Program are used by policyholders and adjusters to collect the information needed to investigate, document, evaluate, and settle claims against National Flood Insurance Program policies for flood damage to their insured property or qualification for benefits under Increased Cost of Compliance coverage.

Affected Public: Individuals or households; Business or other for-profit; Not for-profit institutions; farms; Federal Government; State, local or Tribal government.

Estimated Total Annual Burden Hours: 20,841.6 Hours.

ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/form No.	Number of respondents	Number of responses per respondent	Total Number of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate	Total annual respondent cost
Business or other for-profit.	National Flood Insurance Program Worksheet-Contents-Personal Property/FEMA Form 86–0–06.	2,184	1	2,184	2.5	5,460.0	$38.74	$211,520
Business or other for-profit.	Worksheet—Building/FEMA Form 086–0–07.	3,640	1	3,640	2.5	9,100.0	38.74	352,534
Business or other for-profit.	Worksheet—Building (Continued)/FEMA Form 086–0–08.	3,640	1	3,640	1	3,640.0	38.74	141,014
Business or other for-profit.	Proof of Loss/FEMA Form 086–0–09.	3,640	1	3,640	0.08	291.2	38.74	11,281
Business or other for-profit.	Increased Cost of Compliance Proof of Loss/FEMA Form 086–0–10.	260	1	260	2	520.0	38.74	20,145
Business or other for-profit.	Notice of Loss/FEMA Form 086–0–11.	3,640	1	3,640	0.07	254.8	40.68	10,365
Business or other for-profit.	Statement as to Full Cost of Repair or Replacement under the Replacement Cost Coverage, Subject to the Terms and Conditions of this Policy/FEMA Form 086–0–12.	1,040	1	1,040	0.1	104.0	38.74	4,029
Business or other for-profit.	National Flood Insurance Program Preliminary Report/FEMA Form 086–0–13.	3,640	1	3,640	0.07	254.8	38.74	9,871
Business or other for-profit.	National Flood Insurance Program Final Report/FEMA Form 086–0–14.	3,640	1	3,640	0.07	254.8	38.74	9,871
Business or other for-profit.	National Flood Insurance Program Narrative Report/FEMA Form 086–0–15.	2,080	1	2,080	0.08	166.4	38.74	6,446
Business or other for-profit.	Cause of Loss and Subrogation Report/FEMA Form 086–0–16.	364	1	364	1	364.0	38.74	14,101
Business or other for-profit.	Manufactured (Mobile) Home/Travel Trailer Worksheet/FEMA Form 086–0–17.	208	1	208	0.05	10.4	38.74	403
Business or other for-profit.	Manufactured (Mobile) Home/Travel Trailer Worksheet (Continued)/FEMA Form 086–0–18.	208	1	208	0.25	52.0	38.74	2,014
Business or other for-profit.	Increased Cost of Compliance (ICC) Adjuster Report/FEMA Form 086–0–19.	260	1	260	0.42	109.2	38.74	4,230
Business or other for-profit.	Adjuster Preliminary Damage Assessment/FEMA Form 086–0–20.	520	1	520	0.25	130.0	38.74	5,036
Business or other for-profit.	Adjuster Certification Application/FEMA Form 086–0–21.	520	1	520	0.25	130.0	38.74	5,036
Total	.....	3,640	.....	29,484	.....	20841.6	.....	807,898

Estimated Cost: There are no operation and maintenance, or capital and start-up costs associated with this collection of information.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Dated: April 28, 2010.

Samuel C. Smith,

Acting Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–10526 Filed 5–4–10; 8:45 am]

BILLING CODE 9110–11–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2010–0026]

Agency Information Collection Activities: Proposed Collection; Comment Request, 1660–0046; FEMA/EMI Independent Study Course Enrollment and Test Answer Sheet

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 60-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0046; FEMA Form 064–0–9 (formerly 95–23), FEMA/EMI Independent Study Course Enrollment and Test Answer Sheet (paper and electronic).

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this Notice seeks comments concerning the collection of information necessary to allow students to enroll in online independent study courses and take the tests after study is complete.

DATES: Comments must be submitted on or before July 6, 2010.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *http://www.regulations.gov* under docket ID FEMA–2010–0026. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Office of Chief Counsel, Regulation and Policy Team, DHS/FEMA, 500 C Street, SW., Room 835, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *E-mail.* Submit comments to *FEMA–POLICY@dhs.gov*. Include docket ID FEMA–2010–0026 in the subject line.

All submissions received must include the agency name and docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available on the Privacy and Use Notice link on the Administration Navigation Bar of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Mollie Herrick, Systems Specialist, FEMA/EMI/Distance Learning Branch at 301–447–1407 for additional information. You may contact the Records Management Division for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA–Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION: FEMA's Emergency Management Institute (EMI) provides a wide variety of training to emergency management personnel throughout the country. The EMI Independent Study (IS) Program is part of the FEMA training program authorized under the Robert T. Stafford Disaster Relief and Emergency Act, 42 U.S.C. 5121–5207, Public Law 93–288 as amended. These courses are offered online by the Emergency Management Institute (EMI). The IS Program provides valuable training to Federal, State, local and Tribal emergency management personnel and the general citizenry of the United States without having to attend a resident course at EMI, or at a State-sponsored course. The National Incident Management System (NIMS) is our nation's incident management system. Homeland Security Presidential Directive 5, "Management of Domestic Incidents" requires the adoption of NIMS by all Federal departments and agencies. This directive also requires that Federal preparedness assistance funding for States, Territories, local jurisdictions and Tribal entities be dependent on being NIMS compliance.

Collection of Information

Title: FEMA/EMI Independent Study Course Enrollment and Test Answer Sheet.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0046.

Form Titles and Numbers: FEMA Form 064–0–9 (formerly 95–23), FEMA/EMI Independent Study Course Enrollment and Test Answer Sheet (paper and electronic).

Abstract: The Independent Study (IS) program offers self-paced courses designed for people who have emergency management responsibilities and the general public. All are offered free-of-charge to those who qualify for enrollment. Those who wish to participate select the course(s) they want to take, review the material and then complete an examination covering coursework. Successful completion results in a certificate that can be used to obtain continuing learning credit or even college credit.

Affected Public: Individuals and households, business or other for-profit, not for profit institutions, farms, Federal government, State, local or Tribal government.

Estimated Total Annual Burden Hours: 3,925,204 Hours.

ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/Form No.	Number of respondents	Number of responses per respondent	Total number of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate	Total annual respondent cost
State, local or Tribal Government; Business or other for-profit; Not-for-profit institutions; Individuals or households; farms.	FEMA/EMI Independent Study Course Enrollment and Test Answer Sheet/FEMA Form 064–0–9 (Electronic).	1,682,231	4	6,728,924	0.5	3,364,462	$28.45	$95,718,944
State, local or Tribal Government; Business or other for-profit; Not-for-profit institutions; Individuals or households; farms.	FEMA/EMI Independent Study Course Enrollment and Test Answer Sheet/FEMA Form 064–0–9 (Paper).	186,914	4	747,656	0.75	560,742	28.45	15,953,110
Total	.....	1,869,145	.....	7,476,580	.....	3,925,204	.....	111,672,054

Estimated Cost: There are no annual capital, start-up, operation or maintenance costs associated with this collection.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Dated: April 28, 2010.

Samuel C. Smith,

Acting Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–10525 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–72–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Agency Information Collection Activities: Regulations Relating to Recordation and Enforcement of Trademarks and Copyrights

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 60-Day Notice and request for comments; Extension of an existing collection of information: 1651–0123.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, CBP invites the general public and other Federal agencies to comment on an information collection requirement concerning the Regulations Relating to Recordation and Enforcement of Trademarks and Copyrights (Part 133 of the CBP Regulations). This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before July 6, 2010, to be assured of consideration.

ADDRESSES: Direct all written comments to U.S. Customs and Border Protection, Attn: Tracey Denning, Office of Regulations and Rulings, 799 9th Street, NW., 7th Floor, Washington, DC. 20229–1177.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Tracey Denning, U.S. Customs and Border Protection, Office of Regulations and Rulings, 799 9th Street, NW., 7th Floor, Washington, DC 20229–1177, at 202–325–0265.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total of capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

Title: Regulations Relating to Recordation and Enforcement of Trademark and Copyrights (Part 133 of the CBP Regulations).

OMB Number: 1651–0123.

Form Number: None.

Abstract: In accordance with 19 CFR part 133, trademark and trade name owners and those claiming copyright protection may submit information to CBP to enable CBP officers to identify violating articles at the borders. In addition, parties seeking to have merchandise excluded from entry must provide proof to CBP of the validity of the rights they seek to protect. The information collected by CBP is used to identify infringing goods at the borders and determine if such goods infringe on

intellectual property rights for which federal law provides import protection. Respondents may submit their information to CBP electronically at *https://apps.cbp.gov/e-recordations/,* or they may submit their information on paper in accordance with 19 CFR 133.2 and 133.3 for trademarks, or 19 CFR 133.32 and 133.33 for copyrights.

Current Actions: This submission is being made to extend the expiration date.

Type of Review: Extension (without change).

Affected Public: Businesses and Individuals.

Estimated Number of Respondents: 2,000.

Estimated Time per Respondent: 2 hours.

Estimated Total Annual Burden Hours: 4,000.

Dated: April 29, 2010.

Tracey Denning,

Agency Clearance Officer, U.S. Customs and Border Protection.

[FR Doc. 2010–10507 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2009–0001]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, OMB No. 1660–0076; Hazard Mitigation Grant Program Application and Reporting

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 30-day notice and request for comments; extension, without change, of a currently approved information collection; OMB No. 1660–0076; No Form.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before June 4, 2010.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Tammi Hines, Acting Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or e-mail address *FEMA–Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: Hazard Mitigation Grant Program Application and Reporting.

Type of Information Collection: Extension, without change, of a currently approved information collection. The type of information collection has changed since publication of the 60-day **Federal Register** notice at 75 FR 3912, Jan. 25, 2010.

OMB Number: 1660–0076.

Form Titles and Numbers: No Form.

Abstract: The Hazard Mitigation Grant Program is a post-disaster program that contributes funds toward the cost of hazard mitigation activities in order to reduce the risk of future damage hardship, loss or suffering in any area affected by a major disaster. FEMA uses applications to provide financial assistance in the form of grant awards and, through grantee quarterly reporting, monitor grantee project activities and expenditure of funds.

Affected Public: State, local, or Tribal Government.

Estimated Number of Respondents: 56.

Frequency of Response: On occasion.

Estimated Average Hour Burden per Respondent: 441 hours.

Estimated Total Annual Burden Hours: 24,696 hours. The estimated total annual burden hours has changed since publication of the 60-day **Federal Register** notice at 75 FR 3912, Jan. 25, 2010.

Estimated Cost: There are no annual capital, start-up, maintenance, or operation costs associated with this collection.

Dated: April 28, 2010.

Samuel C. Smith,

Acting Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–10531 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–47–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2010–0013]

Agency Information Collection Activities: Proposed Collection; Comment Request, 1660–0026; State Administrative Plan for the Hazard Mitigation Grant Program

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 60-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0026; No Form.

SUMMARY: The Federal Emergency Management Agency, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on a proposed revision of a currently approved information collection. In accordance with the Paperwork Reduction Act of 1995, this Notice seeks comments concerning the collection of information known as the State Administrative Plan and its requirement for inclusion with an application for the Hazard Mitigation Grant Program.

DATES: Comments must be submitted on or before July 6, 2010.

ADDRESSES: To avoid duplicate submissions to the docket, please use only one of the following means to submit comments:

(1) *Online.* Submit comments at *http://www.regulations.gov* under Docket ID FEMA–2010–0013. Follow the instructions for submitting comments.

(2) *Mail.* Submit written comments to Office of Chief Counsel, Regulation and Policy Team, DHS/FEMA, 500 C Street, SW., Room 835, Washington, DC 20472–3100.

(3) *Facsimile.* Submit comments to (703) 483–2999.

(4) *E-mail.* Submit comments to *FEMA-POLICY@dhs.gov.* Include Docket ID FEMA–2010–0013 in the subject line.

All submissions received must include the agency name and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to read the Privacy Act notice that is available via a Notice link in the footer of *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Contact Cecelia Rosenberg, Chief, Grants Policy Branch, Mitigation Division, (202) 646–3321 for additional information. You may contact the Records Management Division for copies of the proposed collection of information at facsimile number (202) 646–3347 or e-mail address: *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.,* includes section 404, which established the Hazard Mitigation Grant Program (HMGP). State grant recipients of HMGP funds are required to develop or review/update a State Administrative Plan after each disaster declaration that describes how the State will manage such funds. FEMA is responsible for reviewing and approving the plan for compliance with the requirements of 44 CFR 206.437.

Collection of Information

Title: State Administrative Plan for the Hazard Mitigation Grant Program.

Type of Information Collection: Revision of a currently approved information collection.

OMB Number: 1660–0026.

Form Titles and Numbers: No Form.

Abstract: The State Administrative Plan is a procedural guide that details how the State will administer the Hazard Mitigation Grant Program (HMGP). An approved plan is a prerequisite of receiving HMGP funds and is used by FEMA in making a determination of the approval for a grant and how much each grant will be. The administrative plan may take any form including a chapter within a comprehensive State mitigation program strategy.

Affected Public: State, local, or Tribal Government.

Estimated Total Annual Burden Hours: 512 Hours.

TABLE A.12—ESTIMATED ANNUALIZED BURDEN HOURS AND COSTS

Type of respondent	Form name/Form No.	Number of respondents	Number of responses per respondent	Total number of responses	Avg. burden per response (in hours)	Total annual burden (in hours)	Avg. hourly wage rate*	Total annual respondent cost
State, or Tribal Government.	State Administrative Plan/No Form Number.	32	2	64	8	512	$42.00	$21,504.00
Total		32		64		512		21,504.00

Estimated Cost: There are no capital, operations and maintenance, or start-up costs associated with this collection.

Comments

Comments may be submitted as indicated in the **ADDRESSES** caption above. Comments are solicited to (a) Evaluate whether the proposed data collection is necessary for the proper performance of the agency, including whether the information shall have practical utility; (b) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) enhance the quality, utility, and clarity of the information to be collected; and (d) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Dated: April 28, 2010.

Samuel C. Smith,

Acting Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–10533 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–41–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID: FEMA–2009–0001]

Agency Information Collection Activities: Submission for OMB Review; Comment Request, OMB No. 1660–0002; Disaster Assistance Registration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice; 30-day notice and request for comments; revision of a currently approved information collection; OMB No. 1660–0002; FEMA Form 009–0–1 (Replaces 90–69), Application/Registration for Disaster Assistance; FEMA Form 009–0–2 (Replaces 90–69A), Solicitud/Registro Para Asistencia De Resastre; FEMA Form 009–0–3 (Replaces 90–69B), Declaration and Release; FEMA Form 009–0–4 (Replaces 90–69C), Declaración Y Autorización; FEMA Form 009–0–5 (Replaces 90–69D), Receipt for Government Property; FEMA Form 009–0–6 (Replaces 90–69E), Recibo de Propiedad del Gobierno.

SUMMARY: The Federal Emergency Management Agency (FEMA) has submitted the information collection abstracted below to the Office of Management and Budget for review and clearance in accordance with the requirements of the Paperwork Reduction Act of 1995. The submission describes the nature of the information collection, the categories of respondents, the estimated burden (*i.e.,* the time, effort and resources used by respondents to respond) and cost, and the actual data collection instruments FEMA will use.

DATES: Comments must be submitted on or before June 4, 2010.

ADDRESSES: Submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the Desk Officer for the Department of Homeland Security, Federal Emergency Management Agency, and sent via

electronic mail to *oira.submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection should be made to Director, Records Management Division, 1800 South Bell Street, Arlington, VA 20598–3005, facsimile number (202) 646–3347, or e-mail address *FEMA-Information-Collections-Management@dhs.gov.*

SUPPLEMENTARY INFORMATION:

Collection of Information

Title: Disaster Assistance Registration.

Type of information collection: Revision of a currently approved information collection. The type of collection has changed since publication of the 60-day **Federal Register** Notice at 74 FR 68851, December 29, 2009.

OMB Number: 1660–0002.

Form Titles and Numbers: FEMA Form 009–0–1 (Replaces 90–69), Application/Registration for Disaster Assistance; FEMA Form 009–0–2 (Replaces 90–69A), Solicitud/Registro Para Asistencia De Resastre; FEMA Form 009–0–3 (Replaces 90–69B), Declaration and Release; FEMA Form 009–0–4 (Replaces 90–69C), Declaración Y Autorización; FEMA Form 009–0–5 (Replaces 90–69D), Receipt for Government Property; FEMA Form 009–0–6 (Replaces 90–69E), Recibo de Propiedad del Gobierno.

Abstract: Disaster Assistance Registration is a program used to provide financial assistance and, if necessary, direct assistance to eligible individuals and households who, as a direct result of a disaster, have uninsured or under-insured, necessary expenses and serious needs and are unable to meet such expenses or needs through other financial means. The instruments used in this collection collect the information necessary to determine the appropriate level of assistance to each individual.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 1,718,291.

Frequency of Response: On Occasion.

Estimated Average Hour Burden per Respondent: .32 hours.

Estimated Total Annual Burden Hours: 555,009 hours.

Estimated Cost: There is no operation, maintenance, start-up or capital cost associated with this collection.

Dated: April 28, 2010.

Samuel C. Smith,

Acting Director, Records Management Division, Mission Support Bureau, Federal Emergency Management Agency, Department of Homeland Security.

[FR Doc. 2010–10537 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

[CIS No. 2487–09; DHS Docket No. USCIS 2010–0030]

RIN 1615–ZA93

Extension of the Designation of Honduras for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Honduran TPS Beneficiaries

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Notice.

SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) has extended the designation of Honduras for temporary protected status (TPS) for 18 months from its current expiration date of July 5, 2010, through January 5, 2012. This Notice also sets forth procedures necessary for nationals of Honduras (or aliens having no nationality who last habitually resided in Honduras) with TPS to re-register and to apply for an extension of their employment authorization documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who previously registered for TPS under the designation of Honduras and whose applications have been granted or remain pending. Certain nationals of Honduras (or aliens having no nationality who last habitually resided in Honduras) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.

New EADs with a January 5, 2012, expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for EADs. Given the timeframes involved with processing TPS re-registration applications, the Department of Homeland Security recognizes the possibility that all re-registrants may not receive new EADs until after their current EADs expire on July 5, 2010. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Honduras for 6 months, through January 5, 2011, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended.

DATES: The extension of the TPS designation of Honduras is effective July 6, 2010, and will remain in effect through January 5, 2012. The 60-day re-registration period begins May 5, 2010, and will remain in effect until July 6, 2010.

FOR FURTHER INFORMATION CONTACT:

- For further information on TPS, including guidance on the application process and additional information on eligibility, please visit the USCIS Web site at *http://www.uscis.gov*. Select "Temporary Protected Status" from the homepage. You can find detailed information about this TPS extension on our Web site at the Honduran Questions & Answers Section.
- You can also contact the TPS Operations Program Manager, Status and Family Branch, Service Center Operations Directorate, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529–2060, telephone (202) 272–1533. This is not a toll-free call. **Note:** The phone number provided here is solely for questions regarding this TPS notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online available at the USCIS Web site at *http://www.uscis.gov*, or call the USCIS National Customer Service Center at 1–800–375–5283 (TTY 1–800–767–1833).
- Further information will also be available at local USCIS offices upon publication of this Notice.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

Act—Immigration and Nationality Act
DHS—Department of Homeland Security
DOS—Department of State
EAD—Employment Authorization Document
OSC—U.S. Department of Justice, Office of Special Counsel for Immigration Related Unfair Employment Practices
PRRAC—European Union's Regional Program for the Reconstruction of Central America
Secretary—Secretary of Homeland Security
TPS—Temporary Protected Status
USAID—U.S. Agency for International Development
USCIS—U.S. Citizenship and Immigration Services

What is Temporary Protected Status?

- TPS is an immigration status granted to eligible nationals of a country designated for TPS under the Act (or to persons without nationality who last habitually resided in the designated country).
- During the period for which the Secretary has designated a country for TPS, TPS beneficiaries are eligible to remain in the United States and may obtain work authorization, so long as they continue to meet the terms and conditions of their TPS status.
- The granting of TPS does not lead to permanent resident status.
- When the Secretary terminates a country's TPS designation, beneficiaries return to the same immigration status they maintained before TPS (unless that status has since expired or been terminated) or to any other status they may have obtained while registered for TPS.

What authority does the Secretary of Homeland Security have to extend the designation of Honduras for TPS?

Section 244(b)(1) of the Immigration and Nationality Act, 8 U.S.C. 1254a(b)(1), authorizes the Secretary, after consultation with appropriate agencies of the government, to designate a foreign State (or part thereof) for TPS.[1] The Secretary may then grant TPS to eligible nationals of that foreign State (or aliens having no nationality who last habitually resided in that State). Section 244(a)(1)(A) of the Act, 8 U.S.C. 1254a(a)(1)(A).

At least 60 days before the expiration of a TPS designation, the Secretary, after consultation with appropriate agencies of the government, must review the conditions in a foreign State designated for TPS to determine whether the conditions for the TPS designation continue to be met and, if so, must determine the length of an extension of the TPS designation. Section 244(b)(3)(A), (C) of the Act, 8 U.S.C. 1254a(b)(3)(A), (C). If the Secretary determines that the foreign State no longer meets the conditions for the TPS designation, the Secretary must terminate the designation. Section 244(b)(3)(B) of the Act, 8 U.S.C. 1254a(b)(3)(B).

[1] As of March 1, 2003, in accordance with section 1517 of title XV of the Homeland Security Act of 2002 (HSA), Public Law 107–296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Immigration and Nationality Act describing functions transferred under the HSA from the Department of Justice to the Department of Homeland Security "shall be deemed to refer to the Secretary" of Homeland Security. *See* 6 U.S.C. 557 (2003) (codifying HSA, tit. XV, sec. 1517).

When was Honduras designated for TPS?

On January 5, 1999, the Attorney General designated Honduras for TPS based on an environmental disaster within that country, specifically the devastation resulting from Hurricane Mitch. 64 FR 524. *See* section 244(a)(b)(1)(B) of the Act, 8 U.S.C. 1254a(b)(1)(B). The last extension of TPS for Honduras was announced on October 1, 2008, based on the Secretary's determination that the conditions warranting the designation continued to be met. 73 FR 57133. This announcement is the ninth extension of TPS for Honduras.

Why is the Secretary extending the TPS designation for Honduras through January 5, 2012?

Over the past year, DHS and the Department of State (DOS) have continued to review conditions in Honduras. Based on this review, and after consulting with the Department of State, the Secretary has determined that an 18-month extension is warranted because there continues to be a substantial, but temporary, disruption of living conditions in Honduras resulting from Hurricane Mitch, and Honduras remains unable, temporarily, to adequately handle the return of its nationals.

Hurricane Mitch resulted in the loss of thousands of lives, displacement of thousands more, collapse of physical infrastructure, and severe damage to the country's economic system. *See* 64 FR 524 (Jan. 5, 1999) (discussing devastation caused by Hurricane Mitch). The Department of State reports that the government and people of Honduras continue to rely heavily on international assistance, and recovery from Hurricane Mitch is still incomplete.

An estimated 80,000 to over 200,000 dwellings were destroyed or severely damaged due to Hurricane Mitch. By 2005, nongovernmental organizations had repaired or built over 15,000 housing units. However, much of the housing still lacked water and electricity. In May 2006, the Honduran government said that more than 600,000 people live in areas designated as "high risk" for flooding. The erosion of agricultural land caused by Mitch has not been reversed. The increased sedimentation caused by Hurricane Mitch to many rivers and streams has also not been reversed, causing them to rise above their banks and flood surrounding areas even with minimal levels of rain. This has caused a decrease in land available for food production and the increased likelihood of flooding, landslides, and forest fires.

All health centers were fully operational and almost all schools had reopened by the end of 1999. However, in those cases where people had to be relocated, infrastructure and personnel for health and education services, as well as employment opportunities, were reported to be unavailable.

Despite improvements in the road network, the infrastructure remains basic and vulnerable to further damage from adverse climatic conditions. In fact, in October 2008, half the country's roads were damaged or destroyed in flooding caused by heavy continuous rains brought by Tropical Depression Sixteen. In addition, other natural disasters have occurred since Hurricane Mitch, including flooding in October 2008 and an earthquake in May 2009, which have further delayed the recovery from Hurricane Mitch. These disasters themselves have also caused extensive additional disruption in the affected regions and much of the damaged infrastructure has still not been repaired or replaced.

Honduras is also currently unable to handle adequately the return of tens of thousands of its nationals who now have TPS but no other immigration status in the United States. Their return would greatly aggravate Honduras' deteriorating economy by increasing unemployment. Honduras had a per capita gross domestic product of U.S. $1,845 in 2008; an estimated 59 percent of Honduran households live in poverty; and 36 percent of the labor force was unemployed or underemployed in 2008. The 2009 political crisis exacerbated the effects of the global economic downturn in Honduras by significantly reducing economic activity, particularly in the industrial and tourist sectors, and increasing unemployment. Honduras therefore remains ill-equipped to handle adequately the return of Hondurans in the United States who are TPS beneficiaries.

Based on this review and after consultation with the appropriate Government agencies, the Secretary finds that:

- The conditions that prompted the January 5, 1999, designation of Honduras for TPS continue to be met. *See* section 244(b)(3)(A) of the Act, 8 U.S.C. 1254a(b)(3)(A).
- There continues to be a substantial, but temporary, disruption in living conditions in Honduras as the result of an environmental disaster. *See* section 244(b)(1)(B) of the Act, 8 U.S.C. 1254a(b)(1)(B).
- Honduras continues to be unable, temporarily, to adequately handle the

return of its nationals (or aliens having no nationality who last habitually resided in Honduras). *See* section 244(b)(1)(B) of the Act, 8 U.S.C. 1254a(b)(1)(B).

• The designation of Honduras for TPS should be extended for an additional 18-month period. *See* section 244(b)(3)(C) of the Act, 8 U.S.C. 1254a(b)(3)(C).

• There are approximately 66,000 nationals of Honduras (or aliens having no nationality who last habitually resided in Honduras) who are eligible for TPS under this extended designation.

Notice of Extension of the TPS Designation of Honduras

By the authority vested in me as Secretary of Homeland Security under section 244 of the Act, 8 U.S.C. 1254a, I have determined after consultation with the appropriate government agencies that the conditions that prompted designation of Honduras for temporary protected status (TPS) on January 5, 1999, continue to be met. *See* section 244(b)(3)(A) of the Act, 8 U.S.C. 1254a(b)(3)(A). On the basis of this determination, I am extending the TPS designation of Honduras for 18 months from July 6, 2010, through January 5, 2012.

Janet Napolitano,

Secretary.

Required Application Forms and Application Fees To Register or Re-register for TPS

To register or re-register for TPS, an applicant must submit:

1. Form I–821, Application for Temporary Protected Status,

• You only need to pay the Form I–821 application fee if you are filing an application for late initial registration.

• You do not need to pay the Form I–821 fee for a re-registration; and

2. Form I–765, Application for Employment Authorization.

• If you are filing for re-registration, you must pay the Form I–765 application fee if you want an employment authorization document (EAD).

• If you are filing for late initial registration and want an EAD, you must pay the Form I–765 fee only if you are age 14 through 65. No EAD fee is required if you are under the age of 14 or over the age of 65 and filing for late initial TPS registration.

• You do not pay the Form I–765 fee if you are not requesting an EAD.

You must submit both completed application forms together. You may apply for application and/or biometrics fee waivers if you are unable to pay and you can provide proof through satisfactory supporting documentation. For more information on the application forms and application fees for TPS, please visit the USCIS Web site at *http://www.uscis.gov*.

Biometric Services Fee

Biometrics (such as fingerprints) are required for all applicants 14 years of age or older. Those applicants must submit a biometric services fee. For more information on the biometric services fee, please visit the USCIS Web site at *http://www.uscis.gov*.

Mailing Information

Mail your application for TPS to the proper address in Table 1:

TABLE 1—MAILING ADDRESSES

If . . .	Mail to . . .
You are applying for re-registration through US Postal Service	USCIS, Attn: TPS Honduras, P.O. Box 6943, Chicago, IL 60680–6943.
You are applying for the first time as a late initial registrant through US Postal Service.	U.S. Citizenship and Immigration Services, Attn: TPS Honduras, P.O. Box 6943, Chicago, IL 60680–6943.
You are using a Non-US Postal Service delivery service for both re-registration and first time late initial registration.	USCIS, Attn: TPS Honduras, 131 S. Dearborn—3rd Floor, Chicago, IL 60603–5517.
You were granted TPS by an Immigration Judge (IJ) or the Board of Immigration Appeals (BIA), and you wish to request an EAD or are re-registering for the first time.	USCIS, Attn: TPS Honduras, P.O. Box 7332, Chicago, IL 60680–7332.

E-Filing

If you are re-registering for TPS during the re-registration period and you do not need to submit any supporting documents or evidence, you are eligible to file your applications electronically. For more information on e-filing, please visit the *USCIS E-Filing Reference Guide* at the USCIS Web site at *http://www.uscis.gov*.

Employment Authorization Document (EAD)

May I request an interim EAD at my local USCIS office?

No. USCIS will not issue interim EADs to TPS applicants and re-registrants at local offices.

Am I eligible to receive an automatic 6-month EAD extension from July 6, 2010, through January 5, 2011?

To receive an automatic 6-month extension of your EAD:

• You must be a national of Honduras (or an alien having no nationality who last habitually resided in Honduras) who has applied for and received an EAD under the designation of Honduras for TPS, and

• You have not had TPS withdrawn or denied.

This automatic extension is limited to EADs issued on Form I–766, Employment Authorization Document, bearing an expiration date of July 5, 2010. These EADs must also bear the notation "A–12" or "C–19" on the face of the card under "Category."

What documents may a qualified individual show to his or her employer as proof of employment authorization and identity when completing Form I–9?

During the first six months of this extension, qualified individuals who have received a 6-month automatic extension of their EADs by virtue of this **Federal Register** notice may present their extended TPS-based EADs, as described above, to their employers as proof of identity and employment authorization through January 5, 2011. To minimize confusion over this extension at the time of hire or re-verification, qualified individuals may also present a copy of this **Federal Register** notice regarding the automatic extension of employment authorization documentation through January 5, 2011.

After January 5, 2011, TPS beneficiaries may present their EADs on Form I–766 with an extension date of January 5, 2012, to their employers as proof of employment authorization and identity. The EAD will bear the notation "A–12" or "C–19" on the face of the card under "Category." After January 5, 2011, employers may not accept EADs that no longer have a valid date.

Employers should not request proof of Honduran citizenship. Employers should accept the EADs as valid "List A" documents. Employers should not ask

for additional Form I–9 documentation if presented with an EAD that has been automatically extended or a new valid EAD pursuant to this **Federal Register** notice, and the EAD reasonably appears on its face to be genuine and to relate to the employee. Employees also may present any other legally acceptable document or combination of documents listed on the Form I–9 as proof of identity and employment eligibility.

Note to Employers

Employers are reminded that the laws requiring employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This Notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth re-verification requirements. For questions, employers may call the USCIS Customer Assistance Office at 1–800–357–2099. Employers may also call the U.S. Department of Justice Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) Employer Hotline at 1–800–255–8155.

Note to Employees

Employees or applicants may call the OSC Employee Hotline at 1–800–255–7688 for information regarding the automatic extension. Additional information is available on the OSC Web site at *http://www.justice.gov/crt/osc/*.

[FR Doc. 2010–10620 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

Citizenship and Immigration Services

[CIS No. 2488–09; DHS Docket No. USCIS 2010–0031]

RIN 1615–ZA94

Extension of the Designation of Nicaragua for Temporary Protected Status and Automatic Extension of Employment Authorization Documentation for Nicaraguan TPS Beneficiaries

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security (DHS).

ACTION: Notice.

SUMMARY: This Notice announces that the Secretary of Homeland Security (Secretary) has extended the designation of Nicaragua for temporary protected status (TPS) for 18 months from its current expiration date of July 5, 2010, through January 5, 2012. This Notice also sets forth procedures necessary for nationals of Nicaragua (or aliens having no nationality who last habitually resided in Nicaragua) with TPS to re-register and to apply for an extension of their employment authorization documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who previously registered for TPS under the designation of Nicaragua and whose applications have been granted or remain pending. Certain nationals of Nicaragua (or aliens having no nationality who last habitually resided in Nicaragua) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions.

New EADs with a January 5, 2012, expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for EADs. Given the timeframes involved with processing TPS re-registration applications, the Department of Homeland Security recognizes the possibility that all re-registrants may not receive new EADs until after their current EADs expire on July 5, 2010. Accordingly, this Notice automatically extends the validity of EADs issued under the TPS designation of Nicaragua for 6 months, through January 5, 2011, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended.

DATES: The extension of the TPS designation of Nicaragua is effective July 6, 2010, and will remain in effect through January 5, 2012. The 60-day re-registration period begins May 5, 2010, and will remain in effect until July 6, 2010.

FOR FURTHER INFORMATION CONTACT:

- For further information on TPS, including guidance on the application process and additional information on eligibility, please visit the USCIS Web site at *http://www.uscis.gov*. Select "Temporary Protected Status" from the homepage. You can find detailed information about this TPS extension on our Web site at the Nicaraguan Questions & Answers Section.
- You can also contact the TPS Operations Program Manager, Status and Family Branch, Service Center Operations Directorate, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., Washington, DC 20529–2060, telephone (202) 272–1533. This is not a toll-free call. **Note:** The phone number provided here is solely for questions regarding this TPS notice. It is not for individual case status inquiries. Applicants seeking information about the status of their individual cases can check Case Status Online available at the USCIS Web site at *http://www.uscis.gov,* or call the USCIS National Customer Service Center at 1–800–375–5283 (TTY 1–800–767–1833).
- Further information will also be available at local USCIS offices upon publication of this Notice.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

Act—Immigration and Nationality Act
DHS—Department of Homeland Security
DOS—Department of State
EAD—Employment Authorization Document
OSC—U.S. Department of Justice, Office of Special Counsel for Immigration Related Unfair Employment Practices
PRRAC—European Union's Regional Program for the Reconstruction of Central America
Secretary—Secretary of Homeland Security
TPS—Temporary Protected Status
USCIS—U.S. Citizenship and Immigration Services

What is Temporary Protected Status?

- TPS is an immigration status granted to eligible nationals of a country designated for TPS under the Act (or to persons without nationality who last habitually resided in the designated country).
- During the period for which the Secretary has designated a country for TPS, TPS beneficiaries are eligible to remain in the United States and may obtain work authorization, so long as they continue to meet the terms and conditions of their TPS status.
- The granting of TPS does not lead to permanent resident status.
- When the Secretary terminates a country's TPS designation, beneficiaries return to the same immigration status they maintained before TPS (unless that status has since expired or been terminated) or to any other status they may have obtained while registered for TPS.

What authority does the Secretary of Homeland Security have to extend the designation of Nicaragua for TPS?

Section 244(b)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1254a(b)(1), authorizes the Secretary, after consultation with appropriate agencies of the government, to designate a foreign State (or part thereof) for TPS.[1]

[1] As of March 1, 2003, in accordance with section 1517 of title XV of the Homeland Security Act of

Continued

The Secretary may then grant TPS to eligible nationals of that foreign State (or aliens having no nationality who last habitually resided in that State). Section 244(a)(1)(A) of the Act, 8 U.S.C. 1254a(a)(1)(A).

At least 60 days before the expiration of a TPS designation, the Secretary, after consultation with appropriate agencies of the government, must review the conditions in a foreign State designated for TPS to determine whether the conditions for the TPS designation continue to be met and, if so, must determine the length of an extension of the TPS designation. Section 244(b)(3)(A), (C) of the Act, 8 U.S.C. 1254a(b)(3)(A), (C). If the Secretary determines that the foreign State no longer meets the conditions for the TPS designation, the Secretary must terminate the designation. Section 244(b)(3)(B) of the Act, 8 U.S.C. 1254a(b)(3)(B).

When was Nicaragua designated for TPS?

On January 5, 1999, the Attorney General designated Nicaragua for TPS based on an environmental disaster within that country, specifically the devastation resulting from Hurricane Mitch. 64 FR 526. *See* section 244(a)(b)(1)(B) of the Act, 8 U.S.C. 1254a(b)(1)(B). The last extension of TPS for Nicaragua was announced on October 1, 2008, based on the Secretary's determination that the conditions warranting the designation continued to be met. 73 FR 57138. This announcement is the ninth extension of TPS for Nicaragua.

Why is the Secretary extending the TPS designation for Nicaragua through January 5, 2012?

Over the past year, DHS and the Department of State (DOS) have continued to review conditions in Nicaragua. Based on this review, and after consulting with the Department of State, the Secretary has determined that an 18-month extension is warranted because there continues to be a substantial, but temporary, disruption of living conditions in Nicaragua resulting from Hurricane Mitch, and Nicaragua remains unable, temporarily, to adequately handle the return of its nationals.

Hurricane Mitch resulted in the loss of thousands of lives, displacement of thousands more, collapse of physical infrastructure, and severe damage to the country's economic system. *See* 64 FR 526 (Jan. 5, 1999) (discussing devastation caused by Hurricane Mitch). The government and people of Nicaragua continue to rely heavily on international assistance, and recovery from Hurricane Mitch is still incomplete.

Nicaragua has not fully recovered from Hurricane Mitch. The regions most devastated by Hurricane Mitch, the mountainous north and the isolated Atlantic coast, continue to be the poorest and least developed in the country. Most rural roads in these regions have not been properly rehabilitated since Hurricane Mitch. Despite Millennium Challenge Corporation-sponsored road projects in some of the more populous areas of eastern Chinandega Department along the Honduran border, rural feeder roads remain in poor condition. They remain impassible during the rainy season. A significant number of the 90 health centers and 400 health posts in isolated rural areas destroyed by Mitch have not been rebuilt. Some of the over 500 primary schools that suffered structural damage due to Mitch are still unusable.

In addition, more recent natural disasters have slowed the recovery from Hurricane Mitch. In September 2007, Hurricane Felix, a category 5 storm, struck the area affected by Hurricane Mitch and was followed by heavy rains and flooding. More than 20,450 homes, along with 100 schools, clinics, community centers, and churches were destroyed, and 130 people died. Tropical depression Alma followed in May 2008 and further exacerbated the damage caused by the earlier storms.

Nicaragua continues to suffer from chronic poverty and food insufficiencies, which have compounded recovery challenges. Environmental disasters have destroyed over 100,000 acres of crops. In addition, continued environmental disasters have damaged water supplies, leaving whole communities lacking potable water. According to the United Nations World Food Programme (WFP), these recurring environmental disasters destroyed the country's economic base. Approximately 48% of the population lives below the poverty line, and approximately 17% live in extreme poverty.

Nicaragua is also currently unable to handle adequately the return of thousands of its nationals who now have TPS in the United States, but no other immigration status. Their return would aggravate Nicaragua's deteriorating economy by increasing unemployment already exacerbated by the recent global economic crisis. Economic development has also been hindered and disrupted by electoral fraud and weak and poorly constructed infrastructure, such as the poor condition of rural roads. Nicaragua remains ill-equipped to handle adequately the return of Nicaraguans currently in the United States who are TPS beneficiaries.

Based on this review and after consultation with the appropriate Government agencies, the Secretary finds that:

- The conditions that prompted the January 5, 1999, designation of Nicaragua for TPS continue to be met. *See* section 244(b)(3)(A) of the Act, 8 U.S.C. 1254a(b)(3)(A).
- There continues to be a substantial, but temporary, disruption in living conditions in Nicaragua as the result of an environmental disaster. *See* section 244(b)(1)(B) of the Act, 8 U.S.C. 1254a(b)(1)(B).
- Nicaragua continues to be unable, temporarily, to adequately handle the return of its nationals (or aliens having no nationality who last habitually resided in Nicaragua). *See* section 244(b)(1)(B) of the Act, 8 U.S.C. 1254a(b)(1)(B).
- The designation of Nicaragua for TPS should be extended for an additional 18-month period. *See* section 244(b)(3)(C) of the Act, 8 U.S.C. 1254a(b)(3)(C).
- There are approximately 3,000 nationals of Nicaragua (or aliens having no nationality who last habitually resided in Nicaragua) who are eligible for TPS under this extended designation.

Notice of Extension of the TPS Designation of Nicaragua

By the authority vested in me as Secretary of Homeland Security under section 244 of the Act, 8 U.S.C. 1254a, I have determined after consultation with the appropriate government agencies that the conditions that prompted designation of Nicaragua for temporary protected status (TPS) on January 5, 1999, continue to be met. *See* section 244(b)(3)(A) of the Act, 8 U.S.C. 1254a(b)(3)(A). On the basis of this determination, I am extending the TPS designation of Nicaragua for 18 months

2002 (HSA), Public Law 107–296, 116 Stat. 2135, any reference to the Attorney General in a provision of the Immigration and Nationality Act describing functions transferred under the HSA from the Department of Justice to the Department of Homeland Security "shall be deemed to refer to the Secretary" of Homeland Security. *See* 6 U.S.C. 557 (2003) (codifying HSA, tit. XV, sec. 1517).

from July 6, 2010, through January 5, 2012.

Janet Napolitano,
Secretary.

Required Application Forms and Application Fees to Register or Re-register for TPS

To register or re-register for TPS, an applicant must submit:

1. Form I–821, Application for Temporary Protected Status,

• You only need to pay the Form I–821 application fee if you are filing an application for late initial registration.

• You do not need to pay the Form I–821 fee for a re-registration; and

2. Form I–765, Application for Employment Authorization.

• If you are filing for re-registration, you must pay the Form I–765 application fee if you want an employment authorization document (EAD).

• If you are filing for late initial registration and want an EAD, you must pay the Form I–765 fee only if you are age 14 through 65. No EAD fee is required if you are under the age of 14 or over the age of 65 and filing for late initial TPS registration.

• You do not pay the Form I–765 fee if you are not requesting an EAD.

You must submit both completed application forms together. You may apply for application and/or biometrics fee waivers if you are unable to pay and you can provide proof through satisfactory supporting documentation. For more information on the application forms and application fees for TPS, please visit the USCIS Web site at *http://www.uscis.gov*.

Biometric Services Fee

Biometrics (such as fingerprints) are required for all applicants 14 years of age or older. Those applicants must submit a biometric services fee. For more information on the biometric services fee, please visit the USCIS Web site at *http://www.uscis.gov*.

Mailing Information

Mail your application for TPS to the proper address in Table 1:

TABLE 1—MAILING ADDRESSES

If ...	Mail to ...
You are applying for re-registration through U.S. Postal Service	USCIS, Attn: TPS Nicaragua, P.O. Box 6943, Chicago, IL 60680–6943.
You are applying for the first time as a late initial registrant through U.S. Postal Service.	USCIS, Attn: TPS Nicaragua, P.O. Box 6943, Chicago, IL 60680–6943.
You are using a Non-U.S. Postal Service delivery service for both re-registration and first time late initial registration.	U.S. Citizenship and Immigration Services, Attn: TPS Nicaragua, 131 S. Dearborn—3rd Floor, Chicago, IL 60603–5517.
You were granted TPS by an Immigration Judge (IJ) or the Board of Immigration Appeals (BIA), and you wish to request an EAD or are re-registering for the first time.	USCIS, Attn: TPS Nicaragua, P.O. Box 7332, Chicago, IL 60680–7332.

E-Filing

If you are re-registering for TPS during the re-registration period and you do not need to submit any supporting documents or evidence, you are eligible to file your applications electronically. For more information on e-filing, please visit the *USCIS E-Filing Reference Guide* at the USCIS Web site at *http://www.uscis.gov*.

Employment Authorization Document (EAD)

May I request an interim EAD at my local USCIS office?

No. USCIS will not issue interim EADs to TPS applicants and re-registrants at local offices.

Am I eligible to receive an automatic 6-month EAD extension from July 6, 2010, through January 5, 2011?

To receive an automatic 6-month extension of your EAD:

• You must be a national of Nicaragua (or an alien having no nationality who last habitually resided in Nicaragua) who has applied for and received an EAD under the designation of Nicaragua for TPS, and

• You have not had TPS withdrawn or denied.

This automatic extension is limited to EADs issued on Form I–766, Employment Authorization Document, bearing an expiration date of July 5, 2010. These EADs must also bear the notation "A–12" or "C–19" on the face of the card under "Category."

What documents may a qualified individual show to his or her employer as proof of employment authorization and identity when completing Form I–9?

During the first six months of this extension, qualified individuals who have received a 6-month automatic extension of their EADs by virtue of this **Federal Register** notice may present their extended TPS-based EADs, as described above, to their employers as proof of identity and employment authorization through January 5, 2011. To minimize confusion over this extension at the time of hire or re-verification, qualified individuals may also present a copy of this **Federal Register** notice regarding the automatic extension of employment authorization documentation through January 5, 2011.

After January 5, 2011, TPS beneficiaries may present their EADs on Form I–766 with an extension date of January 5, 2012, to their employers as proof of employment authorization and identity. The EAD will bear the notation "A–12" or "C–19" on the face of the card under "Category." After January 5, 2011, employers may not accept EADs that no longer have a valid date.

Employers should not request proof of Nicaraguan citizenship. Employers should accept the EADs as valid "List A" documents. Employers should not ask for additional Form I–9 documentation if presented with an EAD that has been automatically extended or a new valid EAD pursuant to this **Federal Register** notice, and the EAD reasonably appears on its face to be genuine and to relate to the employee. Employees also may present any other legally acceptable document or combination of documents listed on the Form I–9 as proof of identity and employment eligibility.

Note to Employers

Employers are reminded that the laws requiring employment eligibility verification and prohibiting unfair immigration-related employment practices remain in full force. This Notice does not supersede or in any way limit applicable employment verification rules and policy guidance, including those rules setting forth re-verification requirements. For questions, employers may call the USCIS Customer Assistance Office at 1–800–357–2099. Employers may also call the U.S. Department of Justice Office (DOJ) of Special Counsel for Immigration Related Unfair Employment Practices (OSC) Employer Hotline at 1–800–255–8155.

Note to Employees

Employees or applicants may call the OSC Employee Hotline at 1–800–255–7688 for information regarding the automatic extension. Additional information is available on the OSC Web site at *http://www.justice.gov/crt/osc/*.

[FR Doc. 2010–10619 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2010–0028]

Recovery Fact Sheet RP9580.102, Permanent Relocation

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice of availability.

SUMMARY: This document provides notice of the availability of the final Recovery Fact Sheet RP9580.102, *Permanent Relocation,* which is being issued by the Federal Emergency Management Agency (FEMA).

DATES: This fact sheet is effective April 14, 2010.

ADDRESSES: This final fact sheet is available online at *http://www.regulations.gov* under docket ID FEMA–2010–0028 and on FEMA's Web site at *http://www.fema.gov.* You may also view a hard copy of the final fact sheet at the Office of Chief Counsel, Federal Emergency Management Agency, Room 835, 500 C Street, SW., Washington, DC 20472–3100.

FOR FURTHER INFORMATION CONTACT: Deborah Atkinson, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472, 202–646–8146, or via e-mail at *Deborah.Atkinson@dhs.gov.*

SUPPLEMENTARY INFORMATION:

The purpose of this fact sheet is to provide guidance on eligibility under the Public Assistance Program for the permanent relocation of a disaster damaged facility pursuant to 44 CFR 206.226.

Authority: 42 U.S.C. 5121–5207; 44 CFR part 206.

Robert Farmer,

Deputy Director, Office of Policy and Program Analysis, Federal Emergency Management Agency.

[FR Doc. 2010–10455 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2010–0025]

Recovery Policy RP9523.5, Debris Removal From Waterways

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice of availability.

SUMMARY: This document provides notice of the availability of the final Recovery Policy RP9523.5, *Debris Removal from Waterways.*

DATES: This policy is effective March 29, 2010.

ADDRESSES: This final policy is available online at *http://www.regulations.gov* under docket ID FEMA–2010–0025 and on FEMA's Web site at *http://www.fema.gov.* You may also view a hard copy of the final policy at the Office of Chief Counsel, Federal Emergency Management Agency, Room 835, 500 C Street, SW., Washington, DC 20472.

FOR FURTHER INFORMATION CONTACT: Mr. Byron Mason, Federal Emergency Management Agency, 500 C Street SW., Washington, DC 20472; 202–646–4368 phone; 202–646–3304 facsimile; *Byron.Mason@dhs.gov.*

SUPPLEMENTARY INFORMATION: The Public Assistance Program provides, following a Presidentially-declared major disaster or emergency, supplemental Federal disaster grant assistance for the repair, replacement, or restoration of disaster damaged, publicly-owned facilities and the facilities of certain Private Non-Profit (PNP) organizations. To be eligible under the Public Assistance Program, work must be required as the result of the emergency or major disaster, be located within the designated area, and be the legal responsibility of an eligible applicant. Emergency work that must be performed to reduce or eliminate an immediate threat to life, to protect public health and safety, and to protect improved property that is threatened in a significant way as a result of the major disaster or emergency includes debris removal.

This policy was developed to provide guidance for determining the eligibility of debris removal from navigable waterways, the coastal and inland zones, and wetlands under the Public Assistance Program. Recent disaster activity, including Hurricanes Katrina and Ike, demonstrated the need for additional guidance to clarify the roles and responsibilities of FEMA, the U.S. Army Corps of Engineers (USACE), and the U.S. Coast Guard (USCG) in removing debris, wreckage, and sunken vessels from waterways. This policy draws upon recent disaster experience in delineating eligibility for debris removal from waterways under the Public Assistance Program. The USACE and USCG reviewed and provided input on this policy.

Authority: 42 U.S.C. 5170b, 5173, and 5192.

David J. Kaufman,

Director, Office of Policy and Program Analysis, Federal Emergency Management Agency.

[FR Doc. 2010–10461 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1895–DR; Docket ID FEMA–2010–0002]

Massachusetts; Amendment No. 2 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the Commonwealth of Massachusetts (FEMA–1895–DR), dated March 29, 2010, and related determinations.

DATES: *Effective Date:* April 26, 2010.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Recovery Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the incident period for this disaster is closed effective April 26, 2010.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households in Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050, Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance

(Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2010–10544 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Internal Agency Docket No. FEMA–1906–DR; Docket ID FEMA–2010–0002]

Mississippi; Amendment No. 1 to Notice of a Major Disaster Declaration

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notice.

SUMMARY: This notice amends the notice of a major disaster declaration for the State of Mississippi (FEMA–1906–DR), dated April 29, 2010, and related determinations.

DATES: *Effective Date:* April 29, 2010.

FOR FURTHER INFORMATION CONTACT: Peggy Miller, Recovery Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646–3886.

SUPPLEMENTARY INFORMATION: The notice of a major disaster declaration for the State of Mississippi is hereby amended to include the following areas among those areas determined to have been adversely affected by the event declared a major disaster by the President in his declaration of April 29, 2010.

Attala, Holmes, and Warren Counties for Individual Assistance.

The following Catalog of Federal Domestic Assistance Numbers (CFDA) are to be used for reporting and drawing funds: 97.030, Community Disaster Loans; 97.031, Cora Brown Fund; 97.032, Crisis Counseling; 97.033, Disaster Legal Services; 97.034, Disaster Unemployment Assistance (DUA); 97.046, Fire Management Assistance Grant; 97.048, Disaster Housing Assistance to Individuals and Households In Presidentially Declared Disaster Areas; 97.049, Presidentially Declared Disaster Assistance—Disaster Housing Operations for Individuals and Households; 97.050 Presidentially Declared Disaster Assistance to Individuals and Households—Other Needs; 97.036, Disaster Grants—Public Assistance (Presidentially Declared Disasters); 97.039, Hazard Mitigation Grant.

W. Craig Fugate,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2010–10547 Filed 5–4–10; 8:45 am]

BILLING CODE 9111–23–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R2–ES–2010–N062; 20124–11130000–C2]

Endangered and Threatened Wildlife and Plants; Mexican Wolf (Canis lupus baileyi) Conservation Assessment

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability: Conservation assessment.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of the Mexican Wolf Conservation Assessment (assessment). The assessment provides scientific information relevant to the conservation of the Mexican wolf (*Canis lupus baileyi*) in Arizona and New Mexico as a component of the Service's gray wolf (*Canis lupus*) recovery efforts. Not required by the Endangered Species Act (Act), the assessment is a nonregulatory document that does not require action by any party.

ADDRESSES: An electronic copy of the assessment is on our Web site at *http://www.fws.gov/southwest/es/Library/*. You may also obtain a paper copy by contacting Maggie Dwire, by U.S. mail at U.S. Fish and Wildlife Service, New Mexico Ecological Services Field Office, 2105 Osuna NE, Albuquerque, NM 87113; by telephone at 505–761–4783; by facsimile at 505–346–2542; or by e-mail at *Maggie_Dwire@fws.gov*.

FOR FURTHER INFORMATION CONTACT: Maggie Dwire (*see* **ADDRESSES**).

SUPPLEMENTARY INFORMATION:

Listed Entity

The Mexican wolf was listed as an endangered subspecies of gray wolf in 1976 (41 FR 17736, April 28, 1976). In 1978, the Service listed the gray wolf species in North America south of Canada as endangered, except in Minnesota where it was listed as threatened (43 FR 9607, March 9, 1978). The 1978 rangewide listing of the gray wolf species subsumed the subspecies listing; however, we stated in the preamble to the rule that the Service would continue to recognize the Mexican wolf as a valid biological subspecies for purposes of research and conservation (43 FR 9607). After the 1978 listing of the gray wolf in the U.S. Code of Federal Regulations (CFR), the 50 CFR 17.11(h) List of Endangered and Threatened Wildlife did not explicitly refer to an entity called the "Mexican wolf." Due to the Mexican wolf's previous listed status as a subspecies, we have continued to refer to the gray wolf in the southwestern United States as the "Mexican wolf." Today, the gray wolf has been delisted in Idaho and Montana and portions of Oregon, Washington, and Utah (74 FR 15123, April 2, 2009). It is listed as threatened in Minnesota and remains endangered throughout the remaining coterminous United States and Mexico, except where designated as nonessential experimental populations (63 FR 1752, January 12, 1998, and 74 FR 15123).

Background

The conservation and recovery of species are primary goals of the Service's endangered species program. The Mexican wolf historically inhabited the southwestern United States and portions of Mexico until it was virtually eliminated in the wild by private and governmental predator eradication efforts in the late 1800s and early to mid-1900s. Conservation and recovery efforts to ensure the survival of the Mexican wolf were initially guided by the 1982 Mexican Wolf Recovery Plan (U.S. Fish and Wildlife Service 1982) (recovery plan), which recommended the establishment of a captive breeding program and the reintroduction of Mexican wolves to the wild. Both of these recommendations have been implemented. Today an international captive breeding program houses more than 300 wolves, and a wild population of approximately 42 wolves (as of the official 2009 end-of-year count) inhabits Arizona and New Mexico.

Although the 1982 recovery plan was instrumental in guiding the inception of the Mexican wolf program in the southwest, the plan requires updating to provide current guidance for the reintroduction and recovery effort. We have initiated revisions to the 1982 recovery plan, but have been unable to finalize a revision due to various constraints. We are working to resolve these constraints to reinitiate a full revision of the recovery plan, and are undertaking this conservation assessment as an interim step.

This assessment provides the type of information typically contained in a recovery plan, including the listing history of the Mexican wolf and gray wolf, current species' biology and

ecology, an assessment of current threats to the Mexican wolf in the wild, and an overview and assessment of current conservation and recovery efforts. However, the assessment is not intended to serve as a revised recovery plan for the Mexican wolf. The assessment does not contain recovery criteria, site-specific management actions, or time and cost estimates, the three statutorily required elements of a recovery plan (16 U.S.C. 1533(f)(1)(B)), nor does it contain recommendations for the future of our Mexican wolf program in the southwest. Social and economic aspects of wolf conservation are not addressed in the document. It is a nonregulatory document intended solely as a compilation of current scientific information relevant to Mexican wolf conservation that may be used by any interested party. We intend to use the document as one of many information sources guiding our continuing conservation and recovery efforts in the southwest.

We made the draft conservation assessment available for public review and comment for 60 days (74 FR 913, January 9, 2009). We also conducted a peer review of the assessment during this time. After consideration of public and peer review comments, we made revisions to the assessment and provide the final document to the public with this notice.

Authority: The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: March 16, 2010.

Benjamin N. Tuggle,

Regional Director, Region 2.

[FR Doc. 2010–10470 Filed 5–4–10; 8:45 am]

BILLING CODE 4310–55–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–716]

In the Matter of Certain Large Scale Integrated Circuit Semiconductor Chips and Products Containing Same; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 1, 2010, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Panasonic Corporation, Ltd. of Japan. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain large scale integrated circuit semiconductor chips and products containing same by reason of infringement of certain claims of U.S. Patent Nos. 5,933,364 and 6,834,336. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and cease and desist orders.

ADDRESSES: The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Stephen R. Smith, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2746.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2010).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on April 28, 2010, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain large scale integrated circuit semiconductor chips or products containing the same that infringe one or more of claims 1 and 4–6 of U.S. Patent No. 5,933,364 and claims 18–21, 24–27, and 30–32 of U.S. Patent 6,834,336, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Panasonic Corporation, Ltd., 1006 Kadoma, Kadoma City, Osaka 571–8501, Japan.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Freescale Semiconductor, Inc., 6501 William Cannon Drive West, Austin, Texas 78735.

Freescale Semiconductor Japan Ltd., ARCO Tower 15F, 1–8–1, Shimo-Meguro, Meguro-ku, Tokyo 153–0064, Japan.

Freescale Semiconductor, Xiqing Integrated Semiconductor, Manufacturing Site, No. 15 Xinghua Road, Xiqing Economic Development Area, Tianjin, China 300381.

Freescale Semiconductor, Innovation Center, Zhangjiang Building 20F Unit A, No. 560 Songtao Road, Pudong New District, Shanghai 210203, China.

Freescale Semiconductor Malaysia Sdn. Bhd., NO. 2 Jalan SS 8/2, Free Industrial Zone, Sungai Way, 47300 Petaling Jaya, Selengor, Malaysia.

Freescale Semiconductor Pte. Ltd., 7 Changi South Street 2, #03–00, Singapore 486415.

Freescale Semiconductor Taiwan Ltd., 6F, Unit 6, 66, San-Chong Road, Taipei City 11560, Taiwan.

Mouser Electronics, Inc., 1000 North Main Street, Mansfield, Texas 76063.

Premier Farnell Corporation d/b/a Newark, 7061 East Pleasant Valley, Independence, Ohio 44131.

Motorola Inc., 1303 East Algonquin Road, Schaumburg, Illinois 60196.

(c) The Commission investigative attorney, party to this investigation, is Stephen R. Smith, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be

submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)–(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: April 29, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–10494 Filed 5–4–10; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–715]

In the Matter of Certain Game Controllers; Notice of Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Institution of investigation pursuant to 19 U.S.C. 1337.

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 1, 2010, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, on behalf of Microsoft Corporation of Redmond, Washington. A supplement was filed on April 15, 2010. The complaint alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain game controllers by reason of infringement of U.S. Patent Nos. D521,015; D522,011; D547,763; D581,422; D563,480; and D565,668. The complaint further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue an exclusion order and a cease and desist order.

ADDRESSES: The complaint and supplement, except for any confidential information contained therein, are available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Room 112, Washington, DC 20436, telephone 202–205–2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server at *http://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Lisa A. Murray, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205–2734.

Authority: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2010).

Scope of Investigation: Having considered the complaint, the U.S. International Trade Commission, on April 28, 2010, *ordered that*—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain game controllers that infringe U.S. Patent No. D521,015; U.S. Patent No. D522,011; U.S. Patent No. D547,763; U.S. Patent No. D581,422; U.S. Patent No. D563,480; and U.S. Patent No. D565,668, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: Microsoft Corporation, One Microsoft Way, Redmond, WA 98052.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served: Datel Design and Development Inc., 33 N. Garden Avenue, Clearwater, FL 33755. Datel Design and Development Ltd., Stafford Road, Stone, Staffordshire, ST15 ODG, United Kingdom.

(c) The Commission investigative attorney, party to this investigation, is Lisa A. Murray, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Honorable Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(d)–(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: April 29, 2010.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 2010–10501 Filed 5–4–10; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act

Notice is hereby given that on April 28, 2010, a proposed Consent Decree in *United States of America* v. *AGC Flat Glass North America, Inc., et al.,* Civil Action No. 1:10-cv-00069–IMK, was lodged with the United States District Court for the Northern District of West Virginia.

In this action the United States sought to recover from the defendants response costs incurred by the United States Environmental Protection Agency ("EPA") in responding to releases or threatened releases of hazardous substances at or from the Princeton Enterprises Site, located in Clarksburg, Harrison County, West Virginia (the "Site"). The Consent Decree obligates AGC Flat Glass North America, Inc. and AGC America, Inc., to reimburse EPA's past response costs related to the Site.

The Consent Decree requires the settling parties to pay to the EPA Hazardous Substance Superfund the principal sum of $168,524.08 plus interest, in three installments. The first payment of $70,000 is due within thirty (30) days of entry of the Consent Decree. The second payment of $50,000, plus interest, is due within one hundred and twenty (120) days of entry of the Consent Decree. The third and final payment of $48,524.08, plus interest, is due within two hundred and seventy (270) days of entry of the Consent Decree.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Decree. Comments should be addressed to the Assistant Attorney General, Environmental and Natural Resources Division, and either e-mailed to *pubcomment-ees.enrd@usdoj.gov* or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611, and should refer to *United States of America* v. *AGC Flat Glass North America, Inc., et al.,* Civil Action No. 1:10-cv-00069–IMK, (N.D.W.V.), D.J. Ref. 90–11–3–08696.

The Decree may be examined at the Office of the United States Attorney, Northern District of West Virginia, U.S. Courthouse & Federal Bldg., 1125 Chapline Street, Suite 3000, Wheeling, WV 26003, and at U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103. During the public comment period, the Decree may also be examined on the following Department of Justice Web site, *http://www.usdoj.gov/enrd/Consent_Decrees.html.* A copy of the Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044–7611 or by faxing or e-mailing a request to Tonia Fleetwood (*tonia.fleetwood@usdoj.gov*), fax no. (202) 514–0097, phone confirmation number (202) 514–1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of $ 5.50 (25 cents per page reproduction cost) payable to the U.S. Treasury or, if by e-mail or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,

Assistant Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010–10484 Filed 5–4–10; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Agency Information Collection Activities; Announcement of the Office of Management and Budget (OMB) Control Numbers in Accordance with the Paperwork Reduction Act

AGENCY: Office of Workers' Compensation Programs (OWCP), Labor.

ACTION: Notice; Announcement of NEW OMB Control Numbers for OWCP.

SUMMARY: Pursuant to the Department's reorganization plan effective November 8, 2009, the Department of Labor's (DOL's) former Employment Standards Administration (ESA) (OMB Account Number 1215) was dissolved and its functions were assigned among its four former sub-agencies, of which OWCP was one, by Secretary's Order 9–2009 (74 FR 58836). Thereafter, OMB assigned new Control Numbers for OWCP's collections of information formerly inventoried under the dissolved ESA account.

DATES: This notice is effective upon publication in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Vincent Alvarez, Agency Clearance Officer, Office of Workers' Compensation, U.S. Department of Labor, Room S–3524, 200 Constitution Avenue, NW., Washington, DC 20210, telephone: (202) 693–0372 (this is not a toll-free number) or e-mail: *OWCP-PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), OMB has assigned new Control Numbers to the collections of information formerly inventoried under the OMB account 1215. The new OMB Control Numbers and current OMB-assigned expiration dates are listed below, along with any applicable regulatory citations and/or Agency form numbers.

Previous OMB control No.	New OMB control No.	CFR citation	Agency form No.	Current expiration date
1215–0022	1240–0043	20 CFR 702.234	LS–206	10/31/2011
1215–0023	1240–0042	20 CFR 702.251	LS–207	12/31/2011
1215–0024	1240–0041	20 CFR 702.236, 702.235	LS–208	01/31/2012
1215–0027	1240–0040	20 CFR 702.121	LS–265	02/28/2011
1215–0031	1240–0003	20 CFR 702.201, 702.202, 702.407	LS–202, LS–210	12/31/2010
1215–0034	1240–0039	20 CFR 726.110	OWCP–1	10/31/2011
1215–0052	1240–0038	20 CFR 725.304a, 725.404a	CM–911, CM–911A	09/30/2011
1215–0054	1240–0037	20 CFR 10.315, 30.404, 725.406 and 725.701.	OWCP–957	08/31/2010
1215–0055	1240–0044	20 CFR 10.801, 30.701, 725.701, 725.704, 725.405.	OWCP–1500	11/30/2012
1215–0056	1240–0035	20 CFR 718.204	CM–913	02/28/2011

Previous OMB control No.	New OMB control No.	CFR citation	Agency form No.	Current expiration date
1215–0057	1240–0034	20 CFR 725.405, 725.406, 725.407, 725.408.	CM–936	11/30/2012
1215–0058	1240–0033	20 CFR 725.408, 725.412	CM–2970, CM2970A	12/31/2010
1215–0059	1240–0048	20 CFR 726.206, 726.208, 726.213	CM–921 (Extension request pending in OCIO).	04/30/2010
1215–0060	1240–0032	20 CFR 725.535	CM–905	09/30/2010
1215–0061	1240–0031	20 CFR 725.208	CM–981	05/31/2010
1215–0064	1240–0030	20 CFR 725.621	CM–908	06/30/2012
1215–0066	1240–0029	20 CFR 702.419	LS–1	05/31/2011
1215–0067	1240–0045	20 CFR 10.518, 10.519, 702.506, 702.507.	OWCP–16	05/31/2011
1215–0069	1240–0027	20 CFR 410.221, CFR 725.304	CM–912	08/31/2010
1215–0073	1240–0026	20 CFR 702.121	LS–266	01/31/2011
1215–0078	1240–0049	20 CFR 10.700, 10.702, 702.132	CA–143	12/31/2012
1215–0084	1240–0028	20 CFR 725.513	CM–929, CM–929P	06/30/2011
1215–0085	1240–0036	20 CFR 702.317	LS–18	03/31/2011
1215–0090	1240–0023	20 CFR 718.102, 718.103, 718.104, 718.105.	CM–933, CM–988, CM–2907, CM–1159, CM–933B.	08/31/2011
1215–0103	1240–0046	20 CFR 10.102, 10.211, 10.300, 10.314, 10.331, 10.404, 10.506.	CA–17, CA–16, CA–20, OWCP–5c, OWCP–5b, OWCP–5A, CA–1332, CA–1331, CA–7.	09/30/2011
1215–0105	1240–0047	20 CFR 10.525	CA–1027	12/31/2012
1215–0112	1240–0025	33 USC 910	LS–426	06/30/2012
1215–0113	1240–0024	20 CFR 725.701, 725.706, 725.707	CM–893	10/31/2011
1215–0116	1240–0022	20 CFR 10.735	CA–721, CA–722	08/31/2010
1215–0137	1240–0021	20 CFR 10.801, 30.701, 725.704, 725.705.	OWCP–1168	11/30/2012
1215–0144	1240–0051	20 CFR 10.430–10.441, 725.544(c), 30.510–520.	OWCP–20	11/30/2012
1215–0151	1240–0016	20 CFR 10.528	CA–1032	02/28/2011
1215–0154	1240–0015	20 CFR 10.126	CA–12	05/31/2011
1215–0155	1240–0013	20 CFR 10.7, 10.105, 10.410, 10.413, 10.417, 10.535, 10.537.	CA–5, CA–5B, CA–1031, CA–1074	05/31/2010
1215–0160	1240–0014	20 CFR 702.111, 702.162, 702.174, 702.175, 702.201, 702.202, 702.221, 702.321, 702.242, 702.285, 703.310.	LS–204, LS–267, LS–262, LS–271, LS–274, LS–203, LS–513, LS–200, LS–201.	06/30/2012
1215–0161	1240–0012	5 USC § 8111(b) (FECA) and 33 USC § 908(g) (LHWCA).	OWCP–17	06/30/2012
1215–0166	1240–0010	20 CFR 725.505–513	CM–910	03/31/2012
1215–0167	1240–0009	20 CFR 10.104	CA–2a	05/31/2011
1215–0171	1240–0011	20 CFR 725.365, 725.366	CM–972	12/31/2010
1215–0173	1240–0020	20 CFR 725.510, 725.511, 725.512, 725.513.	CM–623, CM623S, CM–787	09/30/2011
1215–0176	1240–0019	20 CFR 10.801, 30.701, 725.405, 725.406, 725.701, 725.704.	OWCP–04	11/30/2012
1215–0178	1240–0018	5 U.S.C. 8104	CA–2231	06/30/2010
1215–0182	1240–0008	5 USC §§ 8104(a) and 8111(b) (FECA) and 33 USC §§ 908(g) and 939(c).	OWCP–44	07/31/2011
1215–0193	1240–0007	20 CFR 10.802, 30.702, 725.701, 725.705.	OWCP–915	12/31/2012
1215–0194	1240–0050	20 CFR 10.801, 30.701, 725.701, 725.705.	Instruction only (Pharmacy Billing Request).	12/31/2012
1215–0197	1240–0002	20 CFR 30.100, 30.101, 30.102, 30.103, 30.111, 30.113, 30.114, 30.206, 30.207, 30.212, 30.213, 30.214, 30.221, 30.222, 30.231, 30.415, 30.416, 30.417, 30.505, 30.620, 30.806.	EE–1, EE–2, EE–3, EE–4, EE–7, EE–8, EE–9, EE–10, EE–20.	08/31/2010
1215–0200	1240–0001	20 CFR 10.707, 10.710	CA–1108, CA–1122	06/30/2012
1215–0202	1240–0006	20 CFR 61.101, 61.104	CA–278	08/31/2010
1215–0204	1240–0005	20 CFR 703.203, 703.204, 703.205, 703.209, 702.210, 703.212, 703.303, 703.304.	LS–275–IC, LS–275–SI, LS–276	09/30/2010
1215–0206	1240–0017	20 CFR 10.900	CA–40, CA–41, CA–42	06/31/2010
1215–0207	1240–0004	20 CFR 703.116	LS–570	12/31/2012

The Department notes that notwithstanding any other provision of law, individuals are not required to respond to a collection of information or revision thereof unless approved by OMB under the PRA and it displays a currently valid OMB Control Number. 35 U.S.C. 3506(c)(1)(B)(iii)(V) and 5 CFR 1320.5(b).

Authority and Signature

The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 9–2009 (74 FR 58836).

Signed at Washington, DC, this 29th day of April, 2010.

Vincent Alvarez,

Agency Clearance Officer, Office of Workers' Compensation Programs, US Department of Labor.

[FR Doc. 2010–10493 Filed 5–4–10; 8:45 am]

BILLING CODE 4510–CR–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0017]

Occupational Exposure to Noise Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comment.

SUMMARY: OSHA solicits public comments concerning its proposal to extend OMB approval of the information collection requirements specified in the Occupational Exposure to Noise Standard. The information collection requirements specified in the Noise Standard protect workers from suffering material hearing impairment.

DATES: Comments must be submitted (postmarked, sent, or received) by July 6, 2010.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Facsimile: If your comments, including attachments, are not longer than 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger, or courier service: When using this method, you must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2010–0017, U.S. Department of Labor, Occupational Safety and Health Administration, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger, and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m. to 4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and OSHA docket number for the Information Collection Request (ICR) (OSHA–2010–0017). All comments, including any personal information you provide, are placed in the public docket without change, and may be made available online at *http://www.regulations.gov.* For further information on submitting comments see the "Public Participation" heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. You may also contact Todd Owen or Jamaa Hill at the address below to obtain a copy of the ICR.

FOR FURTHER INFORMATION CONTACT: Todd Owen or Jamaa Hill, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor, Room N–3609, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of its continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (the OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of efforts in obtaining information (29 U.S.C. 657).

The information collection requirements specified in the Noise Standard protect workers from suffering material hearing impairment. The information collection requirements of the Noise Standard include conducting noise monitoring; notifying workers when they are exposed at or above an 8-hour time-weighted average of 85 decibels; providing workers with initial and annual audiograms; notifying workers of a loss in hearing based on comparing audiograms; training workers on the effects of noise, hearing protectors, and audiometric examinations; maintaining records of workplace noise exposure and workers' audiograms; and allowing workers, OSHA, and NIOSH access to materials and records required by the Standard.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the Agency's functions, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information collection and transmission techniques.

III. Proposed Actions

The Agency is requesting a decrease in the burden hours from 2,853,730 to 2,604,597, a total decrease of 249,133 hours. The reduction is a result of an 8.3% reduction in the number of workers and manufacturing establishments. Also, the Agency now assumes that 50% of small establishment workers will receive audiometric exams via mobile testing vans. The previous ICR assumed that all small establishment workers would go off-site to receive their audiometric examination.

OSHA will summarize the comments submitted in response to this notice, and will include this summary in its request to OMB to extend the approval

of the information collection requirements contained in the Occupational Exposure to Noise Standard (29 CFR 1910.95).

Type of Review: Extension of a currently approved collection.

Title: Occupational Exposure to Noise Standard (29 CFR 1910.95).

OMB Number: 1218–0048.

Affected Public: Business or other for-profits.

Number of Respondents: 254,475.

Total Responses: 16,458,932.

Frequency: On occasion.

Estimated Time per Response: Varies from 1 minute (.02 hour) for a manager to provide a copy to an affected worker's record to 1 hour for a secretary to prepare and transfer records.

Total Burden Hours: 2,604,597.

Estimated Cost (Operation and Maintenance): $82,190,075.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) Electronically at *http://www.regulations.gov,* which is the Federal e-Rulemaking Portal; (2) by facsimile (fax); or (3) by hard copy. All comments, attachments, and other materials must identify the Agency name and the OSHA docket number for the ICR (Docket No. OSHA–2010–0017). You may supplement electronic submissions by uploading document files electronically. If you wish to mail additional materials in reference to an electronic or facsimile submission, you must submit them to the OSHA Docket Office (*see* the section of this notice titled **ADDRESSES**). The additional materials must identify your electronic comments by your name, date, and the docket number so the Agency can attach them to your comments.

Because of security procedures, the use of regular mail may cause a significant delay in the receipt of comments. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger, or courier service, please contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627).

Comments and submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and date of birth. Although all submissions are listed in the *http://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publically available to read or download through this Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* website to submit comments and access the docket is available through the Web site's "User Tips" link. Contact the OSHA Docket Office for information about materials not available through the Web site, and for assistance in using the Internet to locate docket submissions.

V. Authority and Signature

David Michaels, PhD, MPH, Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 5–2007 (72 FR 31160).

Signed at Washington, DC, on April 29, 2010.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2010–10428 Filed 5–4–10; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–71,414]

TATA Technologies Incorporated, a Subsidiary of TATA Technologies Limited, Formally Known as INCAT, Novi, MI; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on January 21, 2010, applicable to workers of Tata Technologies Incorporated, a subsidiary of TATA Technologies Limited, Novi, Michigan. The notice was published in the **Federal Register** on March 5th, 2010 (75 FR 10322).

At the request of the State Agency, the Department reviewed the certification for workers of the subject firm. The workers are engaged in activities related to providing engineering design and product lifecycle management.

Information reports that before April 2009, Tata Technologies Incorporated, a subsidiary of Tata Technologies Limited, was formally known as INCAT. Some workers separated from employment at the subject firm had their wages reported under two separate unemployment insurance (UI) tax accounts under the names Tata Technologies Incorporated, a subsidiary of Tata Technologies Limited, formally known as INCAT.

Accordingly, the Department is amending this certification to properly reflect this matter.

The intent of the Department's certification is to include all workers of the subject firm who were adversely affected by an affiliated vendor acquiring engineering design and product lifecycle management in India.

The amended notice applicable to TA–W–71,414 is hereby issued as follows:

All workers of Tata Technologies Incorporated, a subsidiary of Tata Technologies Limited, formerly known as INCAT, Novi, Michigan, who became totally or partially separated from employment on or after June 25, 2008, through January 21, 2012, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 13th day of April 2010.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 2010–10523 Filed 5–4–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,235]

SCI, LLC/Zener-Rectifier Operations Division A Wholly Owned Subsidiary of SCI, LLC/ON Semiconductor Including On-Site Leased Workers From Superior Technical Resources Phoenix, AZ; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended ("Act"), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on October 19, 2009, applicable to workers of SCI LLC/Zener-Rectifier, Operations Division, a wholly owned subsidiary of SCI, LLC/ON Semiconductor, Phoenix, Arizona. The notice was published in the **Federal Register** on December 11, 2009 (74 FR 65795).

At the request of the petitioner, the Department reviewed the certification

for workers of the subject firm. The workers are engaged in the production of semiconductor devices.

The company reports that workers leased from Superior Technical Resources were employed on-site at the Phoenix Arizona location of SCI LLC/Zener-Rectifier, Operations Division, a wholly owned subsidiary of SCI, LLC/ON Semiconductor. The Department has determined that these workers were sufficiently under the control of the subject firm to be considered leased workers.

Based on these findings, the Department is amending this certification to include workers leased from Superior Technical Resources working on-site at the Phoenix, Arizona location of SCI LLC/Zener-Rectifier, Operations Division, a wholly owned subsidiary of SCI, LLC/ON Semiconductor.

The amended notice applicable to TA–W–70,235 is hereby issued as follows:

All workers of SCI LLC/Zener-Rectifier, Operations Division, a wholly owned subsidiary of SCI, LLC/ON Semiconductor, including on-site leased workers from Superior Technical Resources Phoenix, Arizona, who became totally or partially separated from employment on or after May 18, 2008, through October 19, 2011, and all workers in the group threatened with total or partial separation from employment on the date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC this 23rd day of April 2010.

Michael W. Jaffe,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 2010–10522 Filed 5–4–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–70,228]

Johnson Controls, Inc., Automotive Experience Division, Including Workers Whose Unemployment Insurance (UI) Wages Are Paid Through Hoover Universal, Greenfield, OH; Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (“Act”), 19 U.S.C. 2273, the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on October 6, 2009, applicable to workers of Johnson Controls, Inc., Automotive Experience Division, Greenfield, Ohio. The notice was published in the Federal Register on December 11, 2009 (74 FR 65798).

At the request of the state, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of foam inserts for the automotive seating industry.

New information shows that Johnson Controls purchased Hoover Universal in 1985 and that some workers separated from employment at the subject firm had their wages reported under a separate unemployment insurance (UI) tax account, under the name Hoover Universal.

Accordingly, the Department is amending this certification to property reflect this matter.

The intent of the Department’s certification is to include all workers of the subject firm who were adversely affected by a shift in production of foam inserts for the automotive seating industry to Canada.

The amended notice applicable to TA–W–70,228 is hereby issued as follows:

All workers of Johnston Controls, Inc., Automotive Experience Division, including workers whose unemployment insurance (UI) wages are paid through Hoover Universal, Greenfield, Ohio, who became totally or partially separated from employment on or after May 19, 2008, through October 6, 2011, and all workers in the group threatened with total or partial separation from employment on date of certification through two years from the date of certification, are eligible to apply for adjustment assistance under Chapter 2 of Title II of the Trade Act of 1974, as amended.

Signed at Washington, DC, this 23rd day of April, 2010.

Del Min Amy Chen,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 2010–10521 Filed 5–4–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Veterans’ Employment and Training

Office of the Assistant Secretary for “Incarcerated Veterans Transition Program”

AGENCY: Veterans’ Employment and Training Service, Department of Labor.

Announcement Type: New Notice of Availability of Funds and Solicitation for Grant Applications. The full announcement is posted on *http://www.grants.gov.*

Funding Opportunity Number: SGA 10–04.

Key Dates: The closing date for receipt of applications is 30 days after publication via *http://www.grants.gov.*

Funding Opportunity Description: The U.S. Department of Labor, Veterans’ Employment and Training Service (VETS), announces a grant competition to fund at least twelve (12) Incarcerated Veterans Reintegration Program (IVTP) grants designed to support incarcerated Veterans “at risk” of homelessness. These grants are being funded under the authority of 38 U.S.C. Section 2021 and 2023 as amended by Public Law 110–387, Sec. 602, titled the Expansion and Extension of Authority for Program of Referral and Counseling Services for At Risk Veterans Transitioning from Certain Institutions.

IVTP grants are intended to address two objectives: (1.) To provide referral and counseling services to assist in reintegrating incarcerated and/or transitioning incarcerated Veterans who are “at risk” of becoming homeless, into meaningful employment within the labor force, and (2.) To stimulate the development of effective service delivery systems that will address the complex problems facing incarcerated and/or transitioning incarcerated Veterans who are “at risk” of homelessness.

The full Solicitation for Grant Application is posted on *http://www.grants.gov* under U.S. Department of Labor/VETS. Applications submitted through *http://www.grants.gov* or hard copy will be accepted. If you need to speak to a person concerning these grants, you may telephone Cassandra Mitchell at 202–693–4570 (not a toll-free number). If you have issues regarding access to the *http://www.grants.gov* Web site, you may telephone the Contact Center Phone at 1–800–518–4726.

Signed at Washington, DC this 29th day of April, 2010.

Cassandra R. Mitchell,

Grant Officer.

[FR Doc. 2010–10553 Filed 5–4–10; 8:45 am]

BILLING CODE 4510–79–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor

herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of *March 29, 2010 through April 9, 2010.*

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) There has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) There has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) The workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) A loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) A summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) Notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) The 1-year period described in paragraph (2); or

(B) Notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W–70,842: Dometic Corporation, Sanitation Division, Leased Workers of Mancan, Inc., Big Prairie, OH: May 28, 2008.

TA–W–72,270: Nielsen Bainbridge, LLC, Leased Workers from Wise Staffing, Gainesboro, TN: September 2, 2008.

TA–W–72,349: Calumet Penreco, LLC, Calumet Specialty Products Partners, L.P. Leased Workers Specialized Staffing, Karns City, PA: September 17, 2008.

TA–W–72,964: Jabil Circuit, Inc., Leased Workers of Extra Resources, HCS

Resource, and Snelling Personnel, Auburn Hills, MI: January 24, 2009.
TA–W–73,020: Alliance Plastics, Filtrona PLC, Leased Workers From Infinity Resources and Remedy Staffing, Erie, PA: December 2, 2008.
TA–W–73,079: Leviton Manufacturing Company, Southern Devices Division, West Jefferson, NC: December 10, 2008.
TA–W–73,042: American Express, Risk Operations Department of Global Prepaid Business Unit, Salt Lake City, UT: December 2, 2008.
TA–W–71,389: Ann Arbor Machine Company, Chelsea, MI: June 10, 2008.
TA–W–71,606: Ridgway Powdered Metals, Including On-Site Leased Workers of Spherion, Ridgway, PA: July 8, 2008.
TA–W–71,638: Manugraph DGM, Inc., Elizabethville, PA: July 8, 2008.
TA–W–71,883: Johnson Controls Interiors, AG Division, Leased Workers of Kelly Temporary Services, Holland, MI: July 25, 2008.
TA–W–71,988: Kenosha Leatherette and Display Co., Kenosha, WI: July 27, 2008.
TA–W–72,303: Precision Mold Builders, Inc., Poplar Bluff, MO: September 14, 2008.
TA–W–72,448: Karastan, Division of Mohawk Industries, Eden, NC: October 13, 2009.
TA–W–71,532: Sitel Operating Corporation, Madison, WI: June 30, 2008.
TA–W–72,074: Sourcecorp/Imageentry, Monticello, KY: August 12, 2008.
TA–W–73,148A: Regal Ware, Inc., West Bend Manufacturing Plant, West Bend, WI: December 27, 2009.
TA–W–73,148: Regal Ware, Inc., Kewaskum Manufacturing Plant, Kewaskum, WI: December 27, 2009.
TA–W–71,169: Woco Motor Acoustic Systems, Inc., Warren, MI: June 2, 2008.
TA–W–73,193: Bassett Fiberboard, Division of Bassett Furniture Industries, Inc., Leased Workers—Ameristaff, Bassett, VA: December 29, 2008.
TA–W–71,459: Eclipse Aviation Corporation, Albuquerque, NM: June 25, 2008.
TA–W–72,196: Wheeling LaBelle Nail Company, Wheeling, WV: September 1, 2008.
TA–W–72,380A: Huitt Mills, Inc., North Wilkesboro, NC: September 16, 2008.
TA–W–72,380: Huitt Mills, Inc., Hildebran, NC: September 16, 2008.
TA–W–72,550: The College House, Inc., Off-Site Workers Reporting to This Location, Richmond, VA: October 2, 2008.
TA–W–72,817: Powers Manufacturing Company, Allison, IA: November 9, 2008.
TA–W–73,032: JM Products, Inc., Little Rock, AR: December 3, 2008.
TA–W–73,037: Top Fashion, Inc., Brooklyn, NY: December 8, 2008.
TA–W–73,062: Maggy London International, Ltd., New York, NY: September 14, 2008.
TA–W–73,280: Luck Service, Inc., New York, NY: December 30, 2008.
TA–W–73,354: Hugo Boss Cleveland, Inc., Brooklyn, OH: January 14, 2009.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W–70,993: Diebold, Inc., North Canton, OH: June 4, 2008.
TA–W–71,318: ILPEA Industries, Inc., Formerly Holm Industries, Inc., Scottsburg, IN: June 18, 2008.
TA–W–71,467: Phillips and Temro Industries, Inc., Leased Workers of Peak Staffing, Eden Prairie, MN: June 24, 2008.
TA–W–71,783A: Kenworth Truck Company, A Division of PACCAR, Inc. Administrative Department, Renton, WA: July 21, 2008.
TA–W–71,783: Kenworth Truck Company, A Division of PACCAR, Inc. Assembly Department, Renton, WA: July 21, 2008.
TA–W–72,064: MDL Corporation, Leased Workers of Randstad US and T. Tran Corporation, Inc., Langhorne, PA: August 11, 2008.
TA–W–72,085: Eley Corporation, Including On-Site Leased Workers from Allied Staffing, Lincoln, NE: August 18, 2008.
TA–W–72,361: Nidec Sankyo America Corporation, Leased Workers from Elwood Staffing Services, Inc., Shelbyville, IN: September 18, 2008.
TA–W–72,473: Rockwell Automation, Operation Engineering Service Division, Leased Workers from Manpower, etc., Dublin, GA: November 9, 2009.
TA–W–72,498: HSBC Finance Corporation, Mettawa, IL: September 21, 2008.
TA–W–72,521: SmithKline Beecham Corporation, Global Manufacturing and Supply Division (GMS) and Global Pack, Durham, NC: October 6, 2008.
TA–W–72,775: Xaloy Corporation, Formerly Spirex Corporation, Sullivan, WI: November 4, 2008.
TA–W–72,838: Will and Baumer Candle Company, LLC, Leased Workers from First Choice Staffing, Liverpool, NY: November 6, 2008.
TA–W–72,902: Haerter Stamping, LLC, Including Onsite Leased Workers of Express Employment Professionals, Kentwood, MI: November 18, 2008.
TA–W–72,911: Sandvik Hard Materials, West Branch, MI: October 26, 2008.
TA–W–73,095: Avon Products, Inc., Springdale, OH: December 13, 2008.
TA–W–73,138: AstenJohnson, Inc., Appleton Division, Appleton, WI: December 10, 2008.
TA–W–73,184: Trans-Guard Industries, Angola, IN: December 22, 2008.
TA–W–73,432: GHSP, Inc., Troy Division, Leased Workers of Manpower, Troy, MI: January 5, 2010.
TA–W–73,484: Tomcar USA Holdings, Inc., Leased Workers From DCYI and Mcalear Management, Rochester Hills, MI: February 5, 2009.
TA–W–73,541: Transmission Technologies Corporation, KUO Group, Leased Workers from Randstad Temporary Service, Knoxville, TN: February 18, 2009.
TA–W–71,551: Freescale Semiconductor, Inc., Multimedia Applications Division, Austin, TX: July 1, 2008.
TA–W–71,598: Computer Sciences Corporation (CSC), Financial Services Group—Life Business, Irving, TX: June 29, 2008.
TA–W–72,067: Raven Antenna Systems, Engineering Department, f/k/a Raven NC LLC, Skyware Global, Smithfield, NC: August 14, 2008.
TA–W–72,218: SOMA Networks, Inc., San Francisco, CA: August 31, 2008.
TA–W–72,313: Printing Solutions LP, Customer Service Division, Waynesboro, VA: September 4, 2008.
TA–W–72,426: Lexington Herald-Leader Services, Inc., McClatchy Newspaper, Finance Division, Lexington, KY: September 24, 2008.
TA–W–72,798: Barnes Aerospace, Windsor Airmotive Division Including On-Site Leased Workers from KForce, East Granby, CT: November 6, 2008.
TA–W–72,979: TTI Transaction Technologies, Inc., Coin Acceptor's, Inc., Union, MO: October 26, 2008.
TA–W–73,004: Bank of America, N.A., Global Storage and Data Transmission, Albany, NY: November 30, 2008.
TA–W–73,105: Avis Budget Car Rental LLC, Contact Center Operations, Avis Budget Group, Wichita Falls, TX: December 14, 2008.

TA–W–73,130: Hartford Financial Services Group, Inc., IT/Group Benefits Division, Simsbury, CT: December 17, 2008.

TA–W–73,208: Nomura Asset Management U.S.A., Inc., Portfolio Management Group, New York, NY: December 12, 2008.

TA–W–73,385: Hewlett Packard, Imaging and Printing Group Operations, Palo Alto, CA: January 28, 2009.

TA–W–73,426: FCI USA, LLC, Corporate Administrative Division, Leased Workers of JFC, Etters, PA: February 1, 2009.

TA–W–72,808: Comcast, West Division, Leased Workers of Convergys, Employers Overload, Beaverton, OR: November 5, 2008.

TA–W–72,944: International Paper Company, Xpedx-Harrisburg NSSC, Camp Hill, PA: November 24, 2008.

TA–W–73,081: Paramount Pictures Corporation, Information Technology Production Engineering Group, Los Angeles, CA: November 30, 2008.

TA–W–73,162: Imation Corporation, Infrastructure and Operations Div., Leased Workers from Charter Solutions, Oakdale, MN: December 21, 2008.

TA–W–73,179: Axiom XCell, Inc., San Diego, CA: December 11, 2008.

The following certifications have been issued. The requirements of Section 222(c) (supplier to a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W–71,067: Plastic Trim International, Inc., East Tawas, MI: June 8, 2008.

TA–W–71,204: Keystone Powdered Metal Company, St. Marys Division, St. Marys, PA: June 15, 2008.

TA–W–71,405: A. Schulman, Inc., Bellevue, OH: June 23, 2008.

TA–W–71,426: Lordstown Seating Systems, Magna Seating, Lordstown, OH: June 25, 2008.

TA–W–71,678: Johnson Controls Seating Systems, LLC, Johnson Controls, Inc. Holdings, Leased Workers from Kelly Services, Columbia, TN: July 14, 2008.

TA–W–71,991: Ironwood Plastics, Inc., Ironwood, MI: August 3, 2008.

TA–W–72,189: DME Company, LLC, Youngwood, PA: August 14, 2008.

TA–W–72,194: Pendleton Woolen Mills, Inc., Washougal, WA: August 24, 2008.

TA–W–72,572: AZ Automotive Corporation, AIG Vantage Capital LP, Center Line, MI: October 9, 2008.

TA–W–72,671: Stein, Inc., Republic Engineered Products, Inc., Lorain, OH: October 23, 2008.

TA–W–72,934: Duluth Services, A Subsidiary of Aerotek, Orion, MI: November 23, 2008.

TA–W–73,222: Weyerhaeuser Longview Logging, Castle Rock, WA: January 5, 2009.

TA–W–73,256: Kyoho Manufacturing California (KHMCA), Leased Workers form Aerotek Staffing, Stockton, CA: January 12, 2009.

TA–W–73,325: Trim Masters, Inc., ICI, Modesto, CA: January 19, 2009.

TA–W–73,524: Evansville Association for the Blind, Evansville, IN: February 2, 2009.

TA–W–73,582: EDAG, LLC, Auburn Hills, MI: February 4, 2009.

The following certifications have been issued. The requirements of Section 222(c) (downstream producer for a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W–71,857: J.J. Bouchard, Inc., Van Buren, ME: July 27, 2008.

TA–W–72,260: HDM Transportation, Lenoir, NC: September 9, 2008.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criterion under paragraph (a)(1), or (b)(1), or (c)(1) (employment decline or threat of separation) of section 222 has not been met.

TA–W–71,771: MEI, LLC, Metal Fabrication Division, Albany, OR.

TA–W–72,036: Ameriprise Financial, Inc., Area Office 133, Akron, OH.

TA–W–73,209: CL Automotive, LLC, Highland Park, MI.

TA–W–73,267: Johnston Supply, Inc., Ashland, OH.

TA–W–73,273: Energy Group Solutions L.L.C., New York, NY.

TA–W–73,578: Burns Industrial Group, Strongsville, OH.

The investigation revealed that the criteria under paragraphs (a)(2)(A)(i) (decline in sales or production, or both) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W–71,432: Baxter Healthcare Corporation, Mountain Home, AR.

The investigation revealed that the criteria under paragraphs (a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W–70,896: Neenah Paper, Neenah, WI.

TA–W–70,922: Hewes Marine Company, Inc., Colville, WA.

TA–W–71,087: Formed Fiber Technologies, Inc., Sidney, OH.

TA–W–71,215: Carl W. Newell Manufacturing, Inc., Glendale, CA.

TA–W–71,515: Hoosier Spline Broach Corporation, Kokomo, IN.

TA–W–71,577: American Coil Systems, LLC, Dallas Industries, Troy, MI.

TA–W–71,597: Siemens Energy and Automation, Inc., Portland, OR.

TA–W–71,690: Certainteed Corporation, Siding Products Group, Claremont, NC.

TA–W–71,758: TTI International, Inc., TTI International LTD, Waukegan, IL.

TA–W–71,887: Carolina Specialty Tools, Inc., Connelly Springs, NC.

TA–W–70,901: Dana Classic Fragrances, Deerfield Beach, FL.

TA–W–71,393: Ethan Allen Retail, Inc., Ethan Allen Global, Ethan Allen Interiors, Wexford, PA.

TA–W–71,555: Carbone of America Industries Corp., Subsidiary of Carbone Lorraine, St. Marys, PA.

TA–W–71,672: BBDO Detroit, Leased Workers from New Dimensions and Computer Aid, Inc., Troy, MI.

TA–W–71,766: General Electric Energy, Subsidiary General Electric Service Parts and Repair Division, Cincinnati, OH.

TA–W–72,061: Butler Manufacturing, Bluescope Steel North America Company, Peoria, IL.

TA–W–72,137A: DHL Express, Troy, MI.

TA–W–72,137B: DHL Express, Southfield, MI.

TA–W–72,137: DHL Express, Romulus, MI.

TA–W–72,367: United Airlines, Operations Centers, Information Technology Division, United Airlines Corporation, Elk Grove Village, IL.

TA–W–72,532: Lower Columbia Head and Neck Associates, Longview, WA.

TA–W–72,545: Century Dodge, Chrysler, Jeep, Wentzville, MO.

TA–W–72,607: Bebe Store, Inc., Benicia, CA.

TA–W–72,750: Schneider National Carriers, Inc., Seville, OH.

TA–W–72,832: Verizon Services Corp., Network Maintenance Operations Center, Falls Church, VA.

TA–W–72,899: Weatherford International, Ozona, TX.

TA–W–73,565: Fred Martin Superstore, Barberton, OH.

Determinations Terminating Investigations of Petitions for Worker Adjustment Assistance

After notice of the petitions was published in the **Federal Register** and on the Department's Web site, as required by Section 221 of the Act (19 U.S.C. 2271), the Department initiated investigations of these petitions.

The following determinations terminating investigations were issued because the petitioner has requested that the petition be withdrawn.

TA–W–71,538: Ricerca Biosciences, LLC, Concord, OH.

TA–W–71,843: Nioxin Research Laboratories, Inc., Leased Workers from Selectsource Staffing and Blusetart Staffing, Lithia Springs, GA.

TA–W–72,523: Warner Automotive Group, Inc., dba Warner Chevrolet Cadillac, Tiffin, OH.

TA–W–73,275: Cummins Bridgeway, LLC, New Hudson, MI.

TA–W–73,419: Bimbo Bakeries USA, Inc., Horsham, PA.

TA–W–73,662: Saxon, Elk River, MN.

TA–W–73,716: Kmart, A Division of Sears Holding Corp, Huber Heights, OH.

TA–W–73,761: Kmart, Milford, OH.

The following determinations terminating investigations were issued in cases where these petitions were not filed in accordance with the requirements of 29 CFR 90.11. Every petition filed by workers must be signed by at least three individuals of the petitioning worker group. Petitioners separated more than one year prior to the date of the petition cannot be covered under a certification of a petition under Section 223(b), and therefore, may not be part of a petitioning worker group. For one or more of these reasons, these petitions were deemed invalid.

TA–W–73,076: TRI–DIM Filter Corp., Working on-Site at Chrysler Group, LLC, Belvidere, IL.

TA–W–73,181: Advanced Technology Services, Inc., Peoria, IL.

The following determinations terminating investigations were issued because the petitioning groups of workers are covered by active certifications. Consequently, further investigation in these cases would serve no purpose since the petitioning group of workers cannot be covered by more than one certification at a time.

TA–W–72,245: Camshaft Machine Company, LLC., Jackson, MI, covered by TA–W–73,308: Camshaft Machine Company, LLC., Jackson, MI.

TA–W–72,679: Logistics Management Services, Inc., Worked on-site at Chrysler LLC, Fenton, MO, Fenton, MO, covered by TA–W–63,052, as amended: Chrysler LLC, including on-site leased workers from Logistics Management Services, Inc.

TA–W–73,329: Resinoid Engineering Corporation, Heath, OH, covered by TA–W–71,175A: Resinoid Engineering Corporation, Heath, OH.

TA–W–73,559: APM Terminals, A.P. Moller-Maersk Group, Charlotte, NC, covered by TA–W–71,914: Maersk Line, a wholly owned subsidiary of APM Terminals, A.P. Moller-Maersk Group, Charlotte, NC.

TA–W–73,748: Commercial Construction Management and Resource, Milford, OH, covered by TA–W–70,115: Senco Brands, Inc., as amended: included on-site leased workers from Commercial Construction Management and Resource, Milford, OH.

TA–W–73,801: Diebold, Inc., North Canton, OH, covered by TA–W–70,993: Diebold, Inc., North Canton, OH.

The following determinations terminating investigations were issued because the petitions are the subject of ongoing investigations under petitions filed earlier covering the same petitioners.

TA–W–73,219: IBM Corporation, Division 7 Server Support, Armonk, NY, covered by TA–W–218: IBM Corporation, Division 7 Server Support, Armonk, NY.

TA–W–73,227: Rexam Beverage Can North America, Oklahoma City, OK, covered by TA–W–70,982: Rexam Beverage Can North America, Oklahoma City, OK.

TA–W–73,673: General Motors Corporation, Detroit, MI, covered by TA–W–73,164: General Motors Renaissance Center, Detroit, MI.

TA–W–73,731: The Berry Company LLC, Erie, PA, covered by TA–W–72,706: The Berry Company LLC, Erie, PA.

The following determinations terminating investigations were issued because the Department issued a negative determination on petitions related to the relevant investigation period applicable to the same worker group. The duplicative petitions did not present new information or a change in circumstances that would result in a reversal of the Department's previous negative determination, and therefore, further investigation would duplicate efforts and serve no purpose.

TA–W–71,573: Severstal Wheeling, Inc., Wheeling, WV.

TA–W–73,318: Cascade Grain Products, LLC, Clatskanie, OR.

I hereby certify that the aforementioned determinations were issued during the period of *March 29, 2010 through April 9, 2010.* Copies of these determinations may be requested under the Freedom of Information Act. Request may be submitted by fax, courier services, or mail to FOIA Disclosure Officer, Office of Trade Adjustment Assistance (ETA), U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210 or to *foiarequest@dol.gov.* These determinations also are available on the Department's Web site at *http://www.doleta.gov/tradeact* under the searchable listing of determinations.

Dated: April 29, 2010.

Elliott S. Kushner,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 2010–10520 Filed 5–4–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–72,151]

UPF, Inc. Flint, MI; Notice of Negative Determination Regarding Application for Reconsideration

By application dated April 7, 2010, the United Auto Workers, Local 599 ("Union"), requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The denial notice was signed on March 10, 2010, and will soon be published in the **Federal Register**.

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The negative determination of the TAA petition filed on behalf of workers at UPF, Inc., Flint, Michigan, was based on the following findings: There was no increase in imports by the workers' firm or the customer of the subject firm of articles like or directly competitive with

the truck chassis produced by the laid-off workers; there was no shift or acquisition by the workers' firm of articles like or directly competitive with the truck chassis produced by the laid-off workers; neither the workers' firm nor the customer of the subject firm imported articles like or directly competitive with articles into which the commercial truck chassis produced by the workers' firm was directly incorporated; and the workers did not produce an article that was used by a firm with TAA-certified workers in the production of an article that was the basis for the TAA-certification.

In the request for reconsideration, the Union representative stated that the workers of the subject firm should be eligible for TAA because:

> General Motors, in 2008–2009, discontinued their commercial truck program * * * UPF was a supplier of truck chassis for the Chevrolet and GM commercial truck program. During General Motors bankruptcy, they decided to bring another truck to the Flint Truck Assembly Plant, the Chevrolet/GMC 900 half-ton extended cab pick-up. GM by-passed UPF for consideration for the truck frame for the 900 half-ton extended cab pick-up. GM went right Magna Cosma International in St. Thomas, Ontario, Canada.

The initial investigation had, in fact, already revealed that the General Motors Flint Truck Plant had discontinued the 560 line of commercial trucks for which the subject firm had been producing truck chassis, and that the Flint Truck Plant is now importing chassis for the 900 series residential trucks from an offshore producer. However, the chassis for the 900 line of residential trucks that are being imported are neither like nor directly competitive with the chassis formerly manufactured by the subject firm for the 560 line of commercial trucks.

The petitioner did not supply facts not previously considered, nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 23rd day of April, 2010.

Del Min Amy Chen,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 2010–10524 Filed 5–4–10; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–72,471]

The Walker Auto Group, Inc., Miamisburg, OH; Notice of Negative Determination Regarding Application for Reconsideration

By application dated March 4, 2010, a representative of the State of Ohio requested administrative reconsideration of the Department's negative determination regarding eligibility to apply for Trade Adjustment Assistance (TAA), applicable to workers and former workers of the subject firm. The negative determination was signed on January 8, 2010. The Department's Notice of determination was published in the **Federal Register** on February 16, 2010 (75 FR 7039).

Pursuant to 29 CFR 90.18(c) reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The negative determination of the TAA petition filed on behalf of workers at The Walker Auto Group, Inc., Miamisburg, Ohio, was based on the finding that the subject firm did not shift abroad the supply of automotive sales or services or increase imports of automotive sales services during the relevant period, and that the workers did not produce an article or supply a service that was used by a firm with TAA-certified workers in the production of an article or supply of a service that was the basis for TAA-certification.

In the request for reconsideration, the petitioner stated that the workers of the subject firm should be eligible for TAA because the Walker Auto Group, Inc., Miamisburg, Ohio, supplies a service (sales and service of Pontiac automobiles)" and "A required minimum of the workforce has been laid off in the 12 months preceding the date of the petition or is threatened with layoffs * * *" and increased imports of articles or services contributed importantly to an actual decline in sales or production of like or directly competitive articles or services at the workers' firm and to the workers' layoff or threat of a layoff." The petitioner further states that the "well-documented * * * import of foreign-made automobiles has increased continually for years, contributing importantly to an actual decline in sales and production of Pontiac cars. * * * The service The Walker Auto Group, Inc. provided was based on the continued production of Pontiac automobiles, therefore the increases of imported cars contributed importantly to the workers' layoff and, for those who remain, the threat of layoff at the end of 2010."

The initial investigation revealed that the subject firm did not shift abroad the supply of automotive sales or services or increase imports of automotive sales services during the relevant period.

No survey of the subject firm's major declining customers regarding their purchases of imported automotive sales or services was done because the subject firm sells retail to individual customers, and there is no major purchaser.

The petitioner did not supply facts not previously considered; nor provide additional documentation indicating that there was either (1) a mistake in the determination of facts not previously considered or (2) a misinterpretation of facts or of the law justifying reconsideration of the initial determination.

After careful review of the request for reconsideration, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After review of the application and investigative findings, I conclude that there has been no error or misinterpretation of the law or of the facts which would justify reconsideration of the Department of Labor's prior decision. Accordingly, the application is denied.

Signed in Washington, DC, this 23rd day of April, 2010.

Del Min Amy Chen,

Certifying Officer, Division of Trade Adjustment Assistance.

[FR Doc. 2010–10519 Filed 5–4–10; 8:45 am]

BILLING CODE 4510–FN–P

OFFICE OF MANAGEMENT AND BUDGET

Cost of Hospital and Medical Care Treatment Furnished by the Department of Defense Military Treatment Facilities; Certain Rates Regarding Recovery From Tortiously Liable Third Persons

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Notice.

SUMMARY: By virtue of the authority vested in the President by Section 2(a) of Pub. L. 87–603 (76 Stat. 593; 42 U.S.C. 2652), and delegated to the Director of the Office of Management and Budget by the President through Executive Order No. 11541 of July 1, 1970, the rates referenced below are hereby established. These rates are for use in connection with the recovery from tortiously liable third persons for the cost of inpatient medical services furnished by military treatment facilities through the Department of Defense (DoD). The rates have been established in accordance with the requirements of OMB Circular A–25, requiring reimbursement of the full cost of all services provided. These inpatient medical service rates became effective October 1, 2009, and will remain in effect until further notice. The outpatient medical, dental, and cosmetic surgery rates published on December 15, 2009, remain in effect until further notice. Note that the aforementioned outpatient rates are 2009 rates, and not 2008 as originally published. Pharmacy rates are updated periodically. A full disclosure of all rates is posted at the DoD's Uniform Business Office Web site: *http://www.tricare.mil/ocfo/mcfs/ubo/mhs_rates/inpatient.cfm.*

Peter R. Orszag,

Director.

[FR Doc. 2010–10549 Filed 5–4–10; 8:45 am]

BILLING CODE P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: (10–047)]

Notice of Information Collection

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of information collection.

SUMMARY: The National Aeronautics and Space Administration, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. 3506©(2)(A)).

DATES: All comments should be submitted within 60 calendar days from the date of this publication.

ADDRESSES: All comments should be addressed Brenda Maxwell, Office of the Chief Information Officer, Mail Suite 2S71, National Aeronautics and Space Administration, Washington, DC 20546–0001.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Brenda Maxwell, Office of the Chief Information Officer, NASA Headquarters, 300 E Street, SW., Mail Suite 2S71, Washington, DC 20546, (202) 358–4616, *brenda.maxwell@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. *Abstract:* The purpose of this project is to assess if National Park Service (NPS) visitors, as well as visitors to other public lands, are benefiting from an interagency partnership, known as Earth to Sky, by measuring awareness and understanding of global climate change in visitors to NPS and other public land locations. An on-site survey will be administered to park visitors to assess their awareness and understanding of global climate change; meaning of and connection to park resources; and perception of trust in sources of information regarding global climate change. Data will be collected in a variety of NPS and other sites from June–Aug, 2010. Results will help NASA and other managers of the Earth to Sky partnership assess the success of the partnership efforts and help refine and encourage the continued collaboration.

II. *Method of Collection:* An on-site survey will be administered to visitors in order to collect the data.

III. *Data:*

Title: An assessment of global climate change in visitors to National Park Service sites and other public lands.

OMB Number: 2700–XXXX.

Type of Review: New.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 1200.

Estimated Time per Response: Voluntary.

Estimated Total Annual Burden Hours: 322.5.

Estimated Total Annual Cost: $0.

IV. *Requests for Comments:*

Comments are invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of NASA, including whether the information collected has practical utility; (2) the accuracy of NASA's estimate of the burden (including hours and cost) of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including automated collection techniques or the use of other forms of information technology.

Brenda J. Maxwell,

NASA PRA Clearance Officer.

[FR Doc. 2010–10467 Filed 5–4–10; 8:45 am]

BILLING CODE P

THE NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Meeting of National Council on the Humanities

AGENCY: The National Endowment for the Humanities.

ACTION: Notice of Meeting.

Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92–463, as amended) notice is hereby given the National Council on the Humanities will meet in Washington, DC on May 20–21, 2010.

The purpose of the meeting is to advise the Chairman of the National Endowment for the Humanities with respect to policies, programs, and procedures for carrying out his functions, and to review applications for financial support from and gifts offered to the Endowment and to make recommendations thereon to the Chairman.

The meeting will be held in the Old Post Office Building, 1100 Pennsylvania Avenue, NW., Washington, DC. A portion of the morning and afternoon sessions on May 20–21, 2010, will not be open to the public pursuant to subsections (c)(4),(c)(6) and (c)(9)(B) of section 552b of Title 5, United States Code because the Council will consider information that may disclose: trade secrets and commercial or financial information obtained from a person and privileged or confidential; information of a personal nature the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; and information the premature disclosure of which would be likely to

significantly frustrate implementation of proposed agency action. I have made this determination under the authority granted me by the Chairman's Delegation of Authority dated July 19, 1993.

The agenda for the sessions on May 20, 2010 will be as follows:

Committee Meetings

(Open to the Public)
Policy Discussion:
9 a.m.–10:30 a.m. Digital Humanities—Room 402
Federal/State Partnership and Public Programs—Room 507
Preservation and Access—Room 415
Research Programs—Room 315
(Closed to the Public)
Discussion of specific grant applications and programs before the Council:
10:30 a.m. until Adjourned Digital Humanities—Room 402
Federal/State Partnership and Public Programs—Room 507
Preservation and Access—Room 415
Research Programs—Room 315

The morning session of the meeting on May 21, 2010 will convene at 9 a.m., in the first floor Council Room M–09, and will be open to the public, as set out below. The agenda for the morning session will be as follows:

A. Minutes of the Previous Meeting

B. Reports

1. Introductory Remarks.
2. Presentation by David Grubin on *The Buddha,* an NEH-supported project.
3. Staff Report.
4. Congressional Report.
5. Reports on Policy and General Matters.
   a. Digital Humanities
   b. Federal/State Partnership
   c. Public Programs
   d. Preservation and Access
   e. Research Programs

The remainder of the proposed meeting will be given to the consideration of specific applications and will be closed to the public for the reasons stated above.

Further information about this meeting can be obtained from Michael P. McDonald, Advisory Committee Management Officer, National Endowment for the Humanities, 1100 Pennsylvania Avenue, NW., Washington, DC 20506, or by calling (202) 606–8322, TDD (202) 606–8282. Advance notice of any special needs or accommodations is appreciated.

Michael P. McDonald,

Advisory Committee Management Officer.

[FR Doc. 2010–10473 Filed 5–4–10; 8:45 am]

BILLING CODE 7536–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40–9083; NRC–2009–0352]

License No. SUB–459; Acknowledgement of Request for Enforcement Action Against U.S. Army Installation Command (Schofield Barracks and Pohakuloa Training Area, Hawaii)

Notice is hereby given that by petition dated March 4, 2010, Isaac D. Harp (petitioner) has requested that the U.S. Nuclear Regulatory Commission (NRC) take enforcement action against the U.S. Army for the unlicensed possession and use of depleted uranium.

As the basis for this request, the petitioner states that the Army's license, SUB–459, expired on October 31, 1964, and if any depleted uranium was possessed or released to the environment after the expiration date, that was an unlawful act and subject to NRC enforcement policies.

The request is being treated pursuant to 10 CFR 2.206 of the Commission's regulations. The request has been referred to the Director of the Office of Federal and State Materials and Environmental Management Programs (FSME). As provided by Section 2.206, the petitioner met with the FSME petition review board on April 14, 2010, to discuss the petition. The results of that discussion were considered in the board's determination regarding the petitioner's request and in establishing the schedule for the review of the petition.

A copy of the request is available in ADAMS (ML100640665) for inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, and from the ADAMS Public Library component on the NRC's Web site, *http://www.nrc.gov* (the Public Electronic Reading Room).

Dated at Rockville, Maryland this 26th day of April, 2010.

For the U.S. Nuclear Regulatory Commission.

Keith I. McConnell,

Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection Program, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2010–10555 Filed 5–4–10; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–16; NRC–2009–0073]

DTE ENERGY; Enrico Fermi Atomic Power Plant Unit 1; Exemption From Certain Low-Level Waste Shipment Tracking Requirements In 10 CFR Part 20 Appendix G

1.0 Background

DTE Energy (DTE) is the licensee and holder of Facility Operating License No. DPR–9 issued for Enrico Fermi Atomic Power Plant, Unit 1 (Fermi-1), located in Monroe County, Michigan. Fermi-1 is a permanently shutdown nuclear reactor facility. DTE is in the process of decommissioning Fermi-1 and radioactive waste shipments from the site are ongoing and expected to increase over the next year. During the decommissioning process, large volumes of slightly contaminated concrete rubble and debris are generated that require shipment for disposal in offsite low-level radioactive waste disposal sites. Experience at other decommissioning nuclear power facilities has shown that, due primarily to the volume of radioactive waste; licensees have encountered an increase in the number of routine shipments that take longer than 20 days from transfer to the shipper to receipt acknowledgment from the disposal site. Each shipment with receipt notifications greater than 20 days requires a special investigation and report to the U.S. Nuclear Regulatory Commission (NRC or the Commission) which the licensee believes to be burdensome and unnecessary to meet the intent of the regulation.

2.0 Request/Action

In a letter to the Commission dated November 13, 2009, DTE requested an exemption from the requirements in 10 CFR part 20, appendix G, section III.E, to investigate and file a report to the NRC if shipments of low-level radioactive waste are not acknowledged by the intended recipient within 20 days after transfer to the shipper. This exemption would extend the time period that can elapse during shipments of low-level radioactive waste before DTE is required to investigate and file a report to the NRC from 20 days to 35 days. The exemption would be applicable to rail and truck/rail mixed-mode shipments. The exemption request is based on an analysis of the historical data of low-level radioactive waste shipment times from the Fermi-1 site to the disposal site.

3.0 Discussion

The proposed action would grant an exemption to extend the 20-day investigation and reporting requirements for shipments of low-level radioactive waste to 35 days.

Historical data derived from experience at Fermi-1 indicates that rail transportation time to waste disposal facilities almost always exceed the 20-day reporting requirement. A review of the Fermi-1 data indicates that transportation time for shipments by rail or truck/rail took over 20 days on average. In addition, administrative processes at the disposal facilities and mail delivery times could add several additional days.

Pursuant to 10 CFR 20.2301, the Commission may, upon application by a licensee or upon its own initiative, grant an exemption from the requirements of regulations in 10 CFR part 20 if it determines the exemption is authorized by law and would not result in undue hazard to life or property. There are no provisions in the Atomic Energy Act (or in any other Federal statute) that impose a requirement to investigate and report on low-level radioactive waste shipments that have not been acknowledged by the recipient within 20 days of transfer.

Therefore, the Commission concludes that there is no statutory prohibition on the issuance of the requested exemption and the Commission is authorized to grant the exemption by law.

The Commission acknowledges that, based on the shipment times to date from the Fermi-1 site to the disposal facility, the need to investigate and report on shipments that take longer than 20 days could result in an excessive administrative burden on the licensee. The Commission finds that the underlying purpose of the Appendix G timing provision at issue is to investigate a late shipment that may be lost, misdirected, or diverted. Furthermore, by extending the elapsed time for receipt acknowledgment to 35 days before requiring investigations and reporting, a reasonable upper limit on shipment duration (based on historical analysis) is still maintained if a breakdown of normal tracking systems were to occur. Consequently, the Commission finds that there is no hazard to life or property by extending the investigation and reporting time for low-level radioactive waste shipments from 20 days to 35 days for rail and truck/rail mixed-mode shipments. Therefore, the Commission concludes that the underlying purpose of 10 CFR part 20, appendix G, section III.E will be met.

4.0 Conclusion

Accordingly, the Commission has determined that, pursuant to 10 CFR 20.2301, the exemption requested by DTE in its November 13, 2009, letter is authorized by law and will not result in undue hazards to life or property. Therefore, the Commission hereby grants DTE an exemption to extend the 20-day investigation and reporting requirements for shipments of low-level radioactive waste, as required by 10 CFR part 20, appendix G, section III.E, to 35 days.

Pursuant to 10 CFR 51.31, the Commission has determined that the granting of this exemption will not have a significant effect on the quality of the human environment as documented in **Federal Register** (FR) notice 75 FR 20867, April 21, 2010.

This exemption is effective upon issuance.

Dated at Rockville, Maryland, this 26th day of April, 2010.

For the U.S. Nuclear Regulatory Commission.

Keith I. McConnell,

Deputy Director, Decommissioning and Uranium Recovery Licensing Directorate, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2010–10552 Filed 5–4–10; 8:45 am]

BILLING CODE 7590–01–P

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: Notice of Reporting Requirements Submitted for OMB Review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATES: Submit comments on or before June 4, 2010. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

Copies: Request for clearance (OMB 83–1), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer.

ADDRESSES: Address all comments concerning this notice to: Agency Clearance Officer, Jacqueline White, Small Business Administration, 409 3rd Street, SW., 5th Floor, Washington, DC 20416; and OMB Reviewer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Jacqueline White, Agency Clearance Officer, (202) 205–7044.

SUPPLEMENTARY INFORMATION:

Title: Secondary Market for Section 504 First Mortgage Loan Pool Program.

Frequency: On Occasion.

SBA Form Numbers: 2401, 2402, 2403, 2404.

Description of Respondents: Program Participants.

Responses: 12,490.

Annual Burden: 33,075.

Title: Alternative Creditworthiness Assessment.

Frequency: On Occasion.

SBA Form Number: 2294.

Description of Respondents: Personnel that assist in the process of loan applications.

Responses: 1,849.

Annual Burden: 8.

Jacqueline White,

Chief, Administrative Information Branch.

[FR Doc. 2010–10475 Filed 5–4–10; 8:45 am]

BILLING CODE P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12102 and #12103]

West Virginia Disaster Number WV–00017

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 2.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of West Virginia (FEMA—1893—DR), dated 03/29/2010.

Incident: Severe Storms, Flooding, Mudslides and Landslides.

Incident Period: 03/12/2010 through 04/09/2010.

Effective Date: 04/27/2010.

Physical Loan Application Deadline Date: 05/28/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 12/29/2010.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of West Virginia, dated 03/29/2010, is hereby amended to include the following areas as adversely affected by the disaster.

Primary Counties: Greenbrier.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Joseph P. Loddo,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2010–10478 Filed 5–4–10; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #12144 and #12145]

Virginia Disaster #VA–00029

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a Notice of the Presidential declaration of a major disaster for Public Assistance Only for the Commonwealth of Virginia (FEMA–1905–DR), dated 04/27/2010.

Incident: Severe Winter Storms and Snowstorms.

Incident Period: 02/05/2010 through 02/11/2010.

Effective Date: 04/27/2010.

Physical Loan Application Deadline Date: 06/28/2010.

Economic Injury (EIDL) Loan Application Deadline Date: 01/27/2011.

ADDRESSES: Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

FOR FURTHER INFORMATION CONTACT: A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Suite 6050, Washington, DC 20416.

SUPPLEMENTARY INFORMATION: Notice is hereby given that as a result of the President's major disaster declaration on 04/27/2010, Private Non-Profit organizations that provide essential services of governmental nature may file disaster loan applications at the address listed above or other locally announced locations.

The following areas have been determined to be adversely affected by the disaster:

Primary Counties: Albemarle, Alexandria City, Appomattox, Arlington, Augusta, Buckingham, Caroline, Clarke, Craig, Culpeper, Essex, Fairfax, Fairfax City, Falls Church City, Fauquier, Fluvanna, Frederick, Fredericksburg City, Greene, Highland, King George, Loudoun, Louisa, Madison, Manassas City, Manassas Park City, Nelson, Orange, Prince William, Rappahannock, Shenandoah, Spotsylvania, Stafford, Tazewell, Warren, Waynesboro City, Winchester City.

The Interest Rates are:

	Percent
For Physical Damage:	
Non-Profit Organizations With Credit Available Elsewhere	3.625
Non-Profit Organizations Without Credit Available Elsewhere	3.000
For Economic Injury:	
Non-Profit Organizations Without Credit Available Elsewhere	3.000

The number assigned to this disaster for physical damage is 12144B and for economic injury is 12145B.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Joseph P. Loddo,

Acting Associate Administrator for Disaster Assistance.

[FR Doc. 2010–10477 Filed 5–4–10; 8:45 am]

BILLING CODE 8025–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–9122; 34–62005/April 29, 2010]

Order Making Fiscal Year 2011 Annual Adjustments to the Fee Rates Applicable Under Section 6(b) of the Securities Act of 1933 and Sections 13(e), 14(g), 31(b), and 31(c) of the Securities Exchange Act of 1934

I. Background

The Commission collects fees under various provisions of the securities laws. Section 6(b) of the Securities Act of 1933 ("Securities Act") requires the Commission to collect fees from issuers on the registration of securities.[1] Section 13(e) of the Securities Exchange Act of 1934 ("Exchange Act") requires the Commission to collect fees on specified repurchases of securities.[2] Section 14(g) of the Exchange Act requires the Commission to collect fees on proxy solicitations and statements in corporate control transactions.[3] Finally, Sections 31(b) and (c) of the Exchange Act require national securities exchanges and national securities associations, respectively, to pay fees to the Commission on transactions in specified securities.[4]

The Investor and Capital Markets Fee Relief Act ("Fee Relief Act") [5] amended Section 6(b) of the Securities Act and Sections 13(e), 14(g), and 31 of the Exchange Act to require the Commission to make annual adjustments to the fee rates applicable under these sections for each of the fiscal years 2003 through 2011, and one final adjustment to fix the fee rates under these sections for fiscal year 2012 and beyond.[6]

II. Fiscal Year 2011 Annual Adjustment to the Fee Rates Applicable Under Section 6(b) of the Securities Act and Sections 13(e) and 14(g) of the Exchange Act

Section 6(b)(5) of the Securities Act requires the Commission to make an annual adjustment to the fee rate applicable under Section 6(b) of the Securities Act in each of the fiscal years 2003 through 2011.[7] In those same fiscal years, Sections 13(e)(5) and 14(g)(5) of the Exchange Act require the Commission to adjust the fee rates under Sections 13(e) and 14(g) to a rate that is equal to the rate that is applicable under Section 6(b). In other words, the annual adjustment to the fee rate under Section 6(b) of the Securities Act also sets the annual adjustment to the fee rates under Sections 13(e) and 14(g) of the Exchange Act.

[1] 15 U.S.C. 77f(b).

[2] 15 U.S.C. 78m(e).

[3] 15 U.S.C. 78n(g).

[4] 15 U.S.C. 78ee(b) and (c). In addition, Section 31(d) of the Exchange Act requires the Commission to collect assessments from national securities exchanges and national securities associations for round turn transactions on security futures. 15 U.S.C. 78ee(d).

[5] Public Law No. 107–123, 115 Stat. 2390 (2002).

[6] *See* 15 U.S.C. 77f(b)(5), 77f(b)(6), 78m(e)(5), 78m(e)(6), 78n(g)(5), 78n(g)(6), 78ee(j)(1), and 78ee(j)(3). Section 31(j)(2) of the Exchange Act, 15 U.S.C. 78ee(j)(2), also requires the Commission, in specified circumstances, to make a mid-year adjustment to the fee rates under Sections 31(b) and (c) of the Exchange Act in fiscal years 2002 through 2011.

[7] The annual adjustments are designed to adjust the fee rate in a given fiscal year so that, when applied to the aggregate maximum offering price at which securities are proposed to be offered for the fiscal year, it is reasonably likely to produce total fee collections under Section 6(b) equal to the "target offsetting collection amount" specified in Section 6(b)(11)(A) for that fiscal year.

Section 6(b)(5) sets forth the method for determining the annual adjustment to the fee rate under Section 6(b) for fiscal year 2011. Specifically, the Commission must adjust the fee rate under Section 6(b) to a "rate that, when applied to the baseline estimate of the aggregate maximum offering prices for [fiscal year 2011], is reasonably likely to produce aggregate fee collections under [Section 6(b)] that are equal to the target offsetting collection amount for [fiscal year 2011]." That is, the adjusted rate is determined by dividing the "target offsetting collection amount" for fiscal year 2011 by the "baseline estimate of the aggregate maximum offering prices" for fiscal year 2011.

Section 6(b)(11)(A) specifies that the "target offsetting collection amount" for fiscal year 2011 is $394,000,000. Section 6(b)(11)(B) defines the "baseline estimate of the aggregate maximum offering price" for fiscal year 2011 as "the baseline estimate of the aggregate maximum offering price at which securities are proposed to be offered pursuant to registration statements filed with the Commission during [fiscal year 2011] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget * * *."

To make the baseline estimate of the aggregate maximum offering price for fiscal year 2011, the Commission is using the same methodology it developed in consultation with the Congressional Budget Office ("CBO") and Office of Management and Budget ("OMB") to project aggregate offering price for purposes of the fiscal year 2010 annual adjustment. Using this methodology, the Commission determines the "baseline estimate of the aggregate maximum offering price" for fiscal year 2011 to be $3,394,310,932,374.[8] Based on this estimate, the Commission calculates the fee rate for fiscal 2011 to be $116.10 per million. This adjusted fee rate applies to Section 6(b) of the Securities Act, as well as to Sections 13(e) and 14(g) of the Exchange Act.

[8] Appendix A explains how we determined the "baseline estimate of the aggregate maximum offering price" for fiscal year 2011 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2011 annual adjustment based on that estimate. The appendix includes the data used by the Commission in making its "baseline estimate of the aggregate maximum offering price" for fiscal year 2011.

III. Fiscal Year 2011 Annual Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Exchange Act

Section 31(b) of the Exchange Act requires each national securities exchange to pay the Commission a fee at a rate, as adjusted by our order pursuant to Section 31(j)(2),[9] which currently is $16.90 per million of the aggregate dollar amount of sales of specified securities transacted on the exchange. Similarly, Section 31(c) requires each national securities association to pay the Commission a fee at the same adjusted rate on the aggregate dollar amount of sales of specified securities transacted by or through any member of the association otherwise than on an exchange. Section 31(j)(1) requires the Commission to make annual adjustments to the fee rates applicable under Sections 31(b) and (c) for each of the fiscal years 2003 through 2011.[10]

Section 31(j)(1) specifies the method for determining the annual adjustment for fiscal year 2011. Specifically, the Commission must adjust the rates under Sections 31(b) and (c) to a "uniform adjusted rate that, when applied to the baseline estimate of the aggregate dollar amount of sales for [fiscal year 2011], is reasonably likely to produce aggregate fee collections under [Section 31] (including assessments collected under [Section 31(d)]) that are equal to the target offsetting collection amount for [fiscal year 2011]."

Section 31(*l*)(1) specifies that the "target offsetting collection amount" for fiscal year 2011 is $1,321,000,000. Section 31(*l*)(2) defines the "baseline estimate of the aggregate dollar amount of sales" as "the baseline estimate of the aggregate dollar amount of sales of securities * * * to be transacted on each national securities exchange and by or through any member of each national securities association (otherwise than on a national securities exchange) during [fiscal year 2011] as determined by the Commission, after consultation with the Congressional Budget Office and the Office of Management and Budget * * *."

To make the baseline estimate of the aggregate dollar amount of sales for fiscal year 2011, the Commission is using the same methodology it developed in consultation with the CBO and OMB to project dollar volume for purposes of prior fee adjustments.[11] Using this methodology, the Commission calculates the baseline estimate of the aggregate dollar amount of sales for fiscal year 2011 to be $69,588,660,831,911. Based on this estimate, and an estimated collection of $17,950 in assessments on security futures transactions under Section 31(d) in fiscal year 2011, the uniform adjusted rate for fiscal year 2011 is $19.20 per million.[12]

IV. Effective Dates of the Annual Adjustments

Section 6(b)(8)(A) of the Securities Act provides that the fiscal year 2011 annual adjustment to the fee rate applicable under Section 6(b) of the Securities Act shall take effect on the later of October 1, 2010, or five days after the date on which a regular appropriation to the Commission for fiscal year 2011 is enacted.[13] Sections 13(e)(8)(A) and 14(g)(8)(A) of the Exchange Act provide for the same effective date for the annual adjustments to the fee rates applicable under Sections 13(e) and 14(g) of the Exchange Act.[14]

Section 31(j)(4)(A) of the Exchange Act provides that the fiscal year 2011 annual adjustments to the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall take effect on the later of October 1, 2010, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2011 is enacted.

V. Conclusion

Accordingly, pursuant to Section 6(b) of the Securities Act and Sections 13(e), 14(g), and 31 of the Exchange Act,[15]

It is hereby ordered that the fee rates applicable under Section 6(b) of the

[9] Order Making Fiscal 2010 Mid-Year Adjustment to the Fee Rates Applicable Under Sections 31(b) and (c) of the Securities Exchange Act of 1934, Rel. No. 34–61605 (March 1, 2010), 75 FR 9964 (March 4, 2010).

[10] The annual adjustments, as well as the mid-year adjustments required in specified circumstances under Section 31(j)(2) in fiscal years 2002 through 2011, are designed to adjust the fee rates in a given fiscal year so that, when applied to the aggregate dollar volume of sales for the fiscal year, they are reasonably likely to produce total fee collections under Section 31 equal to the "target offsetting collection amount" specified in Section 31(*l*)(1) for that fiscal year.

[11] Appendix B explains how we determined the "baseline estimate of the aggregate dollar amount of sales" for fiscal year 2011 using our methodology, and then shows the purely arithmetical process of calculating the fiscal year 2011 annual adjustment based on that estimate. The appendix also includes the data used by the Commission in making its "baseline estimate of the aggregate dollar amount of sales" for fiscal year 2011.

[12] The calculation of the adjusted fee rate assumes that the current fee rate of $16.90 per million will apply through October 31, 2011, due to the operation of the effective date provision contained in Section 31(j)(4)(A) of the Exchange Act.

[13] 15 U.S.C. 77f(b)(8)(A).

[14] 15 U.S.C. 78m(e)(8)(A) and 78n(g)(8)(A).

[15] 15 U.S.C. 77f(b), 78m(e), 78n(g), and 78ee(j).

Securities Act and Sections 13(e) and 14(g) of the Exchange Act shall be $116.10 per million effective on the later of October 1, 2010, or five days after the date on which a regular appropriation to the Commission for fiscal year 2011 is enacted; and

It is further ordered that the fee rates applicable under Sections 31(b) and (c) of the Exchange Act shall be $19.20 per million effective on the later of October 1, 2010, or 30 days after the date on which a regular appropriation to the Commission for fiscal year 2011 is enacted.

By the Commission.

Elizabeth M. Murphy,

Secretary.

Appendix A

With the passage of the Investor and Capital Markets Relief Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to issuers based on the value of their registrations. This appendix provides the formula for determining such fees, which the Commission adjusts annually. Congress has mandated that the Commission determine these fees based on the "aggregate maximum offering prices," which measures the aggregate dollar amount of securities registered with the Commission over the course of the year. In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected aggregate maximum offering prices. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected aggregate maximum offering prices.

For 2011, the Commission has estimated the aggregate maximum offering prices by projecting forward the trend established in the previous decade. More specifically, an ARIMA model was used to forecast the value of the aggregate maximum offering prices for months subsequent to March 2010, the last month for which the Commission has data on the aggregate maximum offering prices.

The following sections describe this process in detail.

A. Baseline Estimate of the Aggregate Maximum Offering Prices for Fiscal Year 2011

First, calculate the aggregate maximum offering prices (AMOP) for each month in the sample (March 2000–March 2010). Next, calculate the percentage change in the AMOP from month to month.

Model the monthly percentage change in AMOP as a first order moving average process. The moving average approach allows one to model the effect that an exceptionally high (or low) observation of AMOP tends to be followed by a more "typical" value of AMOP.

Use the estimated moving average model to forecast the monthly percent change in AMOP. These percent changes can then be applied to obtain forecasts of the total dollar value of registrations. The following is a more formal (mathematical) description of the procedure:

1. Begin with the monthly data for AMOP. The sample spans ten years, from March 2000 to March 2010.

2. Divide each month's AMOP (column C) by the number of trading days in that month (column B) to obtain the average daily AMOP (AAMOP, column D).

3. For each month t, the natural logarithm of AAMOP is reported in column E.

4. Calculate the change in log(AAMOP) from the previous month as $\Delta_t = \log(AAMOP_t)$—$\log(AAMOP_{t-1})$. This approximates the percentage change.

5. Estimate the first order moving average model $\Delta_t = \alpha + \beta e_{t-1} + e_t$, where e_t denotes the forecast error for month t. The forecast error is simply the difference between the one-month ahead forecast and the actual realization of Δ_t. The forecast error is expressed as $e_t = \Delta_t - \alpha - \beta e_{t-1}$. The model can be estimated using standard commercially available software such as SAS or Eviews. Using least squares, the estimated parameter values are $\alpha = -0.0034456$ and $\beta = -0.78509$.

6. For the month of April 2010 forecast $\Delta_{t = 4/10} = \alpha + \beta e_{t = 3/10}$. For all subsequent months, forecast $\Delta_t = \alpha$.

7. Calculate forecasts of log(AAMOP). For example, the forecast of log(AAMOP) for June 2010 is given by $FLAAMOP_{t = 6/10} = \log(AAMOP_{t = 3/10}) + \Delta_{t = 4/10} + \Delta_{t = 5/10} + \Delta_{t = 6/10}$.

8. Under the assumption that e_t is normally distributed, the n-step ahead forecast of AAMOP is given by $\exp(FLAAMOP_t + \sigma_n^2/2)$, where σ_n denotes the standard error of the n-step ahead forecast.

9. For June 2010, this gives a forecast AAMOP of $13.4 Billion (Column I), and a forecast AMOP of $295.9 Billion (Column J).

10. Iterate this process through September 2011 to obtain a baseline estimate of the aggregate maximum offering prices for fiscal year 2011 of $3,394,310,932,374.

B. Using the Forecasts From A to Calculate the New Fee Rate

1. Using the data from Table A, estimate the aggregate maximum offering prices between 10/1/10 and 9/30/11 to be $3,394,310,932,374.

2. The rate necessary to collect the target $394,000,000 in fee revenues set by Congress is then calculated as: $394,000,000 ÷ $3,394,310,932,374 = 0.00011608.

3. Round the result to the seventh decimal point, yielding a rate of 0.0001161 (or $116.10 per million).

Table A. Estimation of baseline of aggregate maximum offering prices .

Fee rate calculation.

a. Baseline estimate of the aggregate maximum offering prices, 10/1/10 to 9/30/11 ($Millions)	3,394,311
b. Implied fee rate ($394 Million / a)	$116.10

Data

(A) Month	(B) # of Trading Days in Month	(C) Aggregate Maximum Offering Prices, in $Millions	(D) Average Daily Aggregate Max. Offering Prices (AAMOP) in $Millions	(E) log(AAMOP)	(F) Change in AAMOP	(G) Forecast log(AAMOP)	(H) Standard Error	(I) Forecast AAMOP, in $Millions	(J) Forecast Aggregate Maximum Offering Prices, in $Millions
Mar-00	23	550,107	23,918	23.898					
Apr-00	19	244,510	12,869	23.278	-0.620				
May-00	22	269,774	12,262	23.230	-0.048				
Jun-00	22	406,409	18,473	23.640	0.410				
Jul-00	20	230,894	11,545	23.169	-0.470				
Aug-00	23	257,797	11,209	23.140	-0.030				
Sep-00	20	332,120	16,606	23.533	0.393				
Oct-00	22	362,493	16,477	23.525	-0.008				
Nov-00	21	317,653	15,126	23.440	-0.086				
Dec-00	20	246,006	12,300	23.233	-0.207				
Jan-01	21	462,726	22,035	23.816	0.583				
Feb-01	19	388,304	20,437	23.741	-0.075				
Mar-01	22	523,443	23,793	23.893	0.152				
Apr-01	20	289,212	14,461	23.395	-0.498				
May-01	22	274,298	12,468	23.246	-0.148				
Jun-01	21	348,268	16,584	23.532	0.285				
Jul-01	21	264,590	12,600	23.257	-0.275				
Aug-01	23	245,591	10,678	23.091	-0.165				
Sep-01	15	178,524	11,902	23.200	0.108				
Oct-01	23	260,719	11,336	23.151	-0.049				
Nov-01	21	286,199	13,629	23.335	0.184				
Dec-01	20	395,230	19,762	23.707	0.372				
Jan-02	21	401,290	19,109	23.673	-0.034				
Feb-02	19	476,837	25,097	23.946	0.273				
Mar-02	20	380,160	19,008	23.668	-0.278				
Apr-02	22	282,947	12,861	23.277	-0.391				
May-02	22	215,645	9,802	23.006	-0.272				

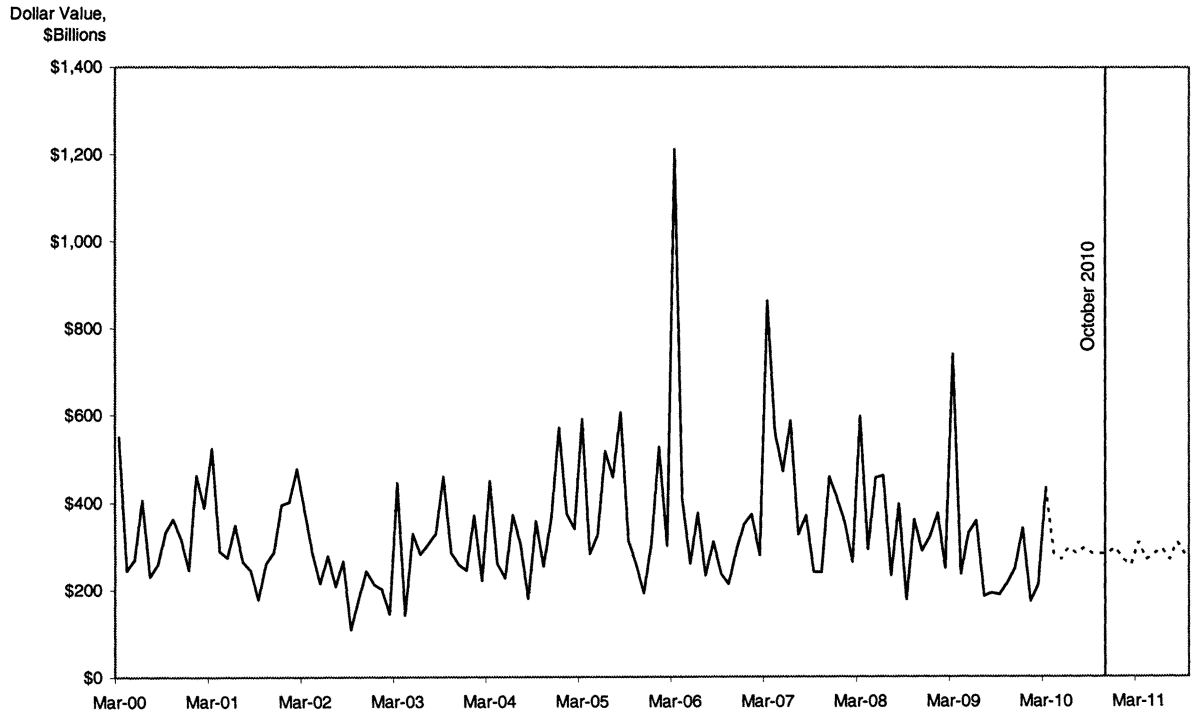
Jun-02	20	277,757	13,888	23.354	0.348							
Jul-02	22	208,638	9,484	22.973	-0.381							
Aug-02	22	265,750	12,080	23.215	0.242							
Sep-02	20	109,565	5,478	22.424	-0.791							
Oct-02	23	179,374	7,799	22.777	0.353							
Nov-02	20	243,590	12,179	23.223	0.446							
Dec-02	21	212,838	10,135	23.039	-0.184							
Jan-03	21	201,839	9,611	22.986	-0.053							
Feb-03	19	144,642	7,613	22.753	-0.233							
Mar-03	21	444,331	21,159	23.775	1.022							
Apr-03	21	142,373	6,780	22.637	-1.138							
May-03	21	328,792	15,657	23.474	0.837							
Jun-03	21	281,580	13,409	23.319	-0.155							
Jul-03	22	304,383	13,836	23.351	0.031							
Aug-03	21	328,351	15,636	23.473	0.122							
Sep-03	21	459,563	21,884	23.809	0.336							
Oct-03	23	285,039	12,393	23.240	-0.569							
Nov-03	19	257,779	13,567	23.331	0.091							
Dec-03	22	244,998	11,136	23.133	-0.197							
Jan-04	20	369,784	18,489	23.640	0.507							
Feb-04	19	221,517	11,659	23.179	-0.461							
Mar-04	23	448,543	19,502	23.694	0.514							
Apr-04	21	260,029	12,382	23.240	-0.454							
May-04	20	227,239	11,362	23.154	-0.086							
Jun-04	21	370,668	17,651	23.594	0.441							
Jul-04	21	305,519	14,549	23.401	-0.193							
Aug-04	22	179,688	8,168	22.823	-0.577							
Sep-04	21	357,007	17,000	23.556	0.733							
Oct-04	21	254,489	12,119	23.218	-0.338							
Nov-04	21	363,406	17,305	23.574	0.356							
Dec-04	22	570,918	25,951	23.979	0.405							
Jan-05	20	375,484	18,774	23.656	-0.324							
Feb-05	19	338,922	17,838	23.605	-0.051							
Mar-05	22	590,862	26,857	24.014	0.409							

Apr-05	21	282,018	13,429		23.321	-0.693						
May-05	21	323,652	15,412		23.458	0.138						
Jun-05	22	517,022	23,501		23.880	0.422						
Jul-05	20	457,487	22,874		23.853	-0.027						
Aug-05	23	605,534	26,328		23.994	0.141						
Sep-05	21	312,281	14,871		23.423	-0.571						
Oct-05	21	258,956	12,331		23.235	-0.187						
Nov-05	21	192,736	9,178		22.940	-0.295						
Dec-05	21	308,134	14,673		23.409	0.469						
Jan-06	20	526,550	26,328		23.994	0.585						
Feb-06	19	301,446	15,866		23.487	-0.506						
Mar-06	23	1,211,344	52,667		24.687	1.200						
Apr-06	19	407,345	21,439		23.788	-0.899						
May-06	22	260,121	11,824		23.193	-0.595						
Jun-06	22	375,296	17,059		23.560	0.367						
Jul-06	20	232,654	11,633		23.177	-0.383						
Aug-06	23	310,050	13,480		23.325	0.147						
Sep-06	20	236,782	11,839		23.195	-0.130						
Oct-06	22	213,342	9,697		22.995	-0.200						
Nov-06	21	292,456	13,926		23.357	0.362						
Dec-06	20	349,512	17,476		23.584	0.227						
Jan-07	20	372,740	18,637		23.648	0.064						
Feb-07	19	278,753	14,671		23.409	-0.239						
Mar-07	22	862,786	39,218		24.392	0.983						
Apr-07	20	562,103	28,105		24.059	-0.333						
May-07	22	470,843	21,402		23.787	-0.272						
Jun-07	21	586,822	27,944		24.053	0.267						
Jul-07	21	326,612	15,553		23.468	-0.586						
Aug-07	23	369,172	16,051		23.499	0.032						
Sep-07	19	241,059	12,687		23.264	-0.235						
Oct-07	23	239,652	10,420		23.067	-0.197						
Nov-07	21	458,654	21,841		23.807	0.740						
Dec-07	20	410,200	20,510		23.744	-0.063						
Jan-08	21	354,433	16,878		23.549	-0.195						

Feb-08	20	263,410	13,171	23.301	-0.248							
Mar-08	20	596,923	29,846	24.119	0.818							
Apr-08	22	292,534	13,297	23.311	-0.809							
May-08	21	456,077	21,718	23.801	0.491							
Jun-08	21	461,087	21,957	23.812	0.011							
Jul-08	22	232,896	10,586	23.083	-0.730							
Aug-08	21	395,440	18,830	23.659	0.576							
Sep-08	21	177,636	8,459	22.858	-0.800							
Oct-08	23	360,494	15,674	23.475	0.617							
Nov-08	19	288,911	15,206	23.445	-0.030							
Dec-08	22	319,584	14,527	23.399	-0.046							
Jan-09	20	375,065	18,753	23.655	0.255							
Feb-09	19	249,666	13,140	23.299	-0.356							
Mar-09	22	739,931	33,633	24.239	0.940							
Apr-09	21	235,914	11,234	23.142	-1.097							
May-09	20	329,522	16,476	23.525	0.383							
Jun-09	22	357,524	16,251	23.511	-0.014							
Jul-09	22	185,187	8,418	22.854	-0.658							
Aug-09	21	192,726	9,177	22.940	0.086							
Sep-09	21	189,224	9,011	22.922	-0.018							
Oct-09	22	215,720	9,805	23.006	0.085							
Nov-09	20	248,353	12,418	23.242	0.236							
Dec-09	22	340,464	15,476	23.463	0.220							
Jan-10	19	173,235	9,118	22.933	-0.529							
Feb-10	19	209,963	11,051	23.126	0.192							
Mar-10	23	432,934	18,823	23.658	0.533							
Apr-10	21					23.253	0.372	13,454	282,542			
May-10	20					23.250	0.381	13,451	269,021			
Jun-10	22					23.246	0.389	13,448	295,851			
Jul-10	21					23.243	0.397	13,444	282,334			
Aug-10	22					23.240	0.405	13,441	295,705			
Sep-10	21					23.236	0.413	13,438	282,195			
Oct-10	21					23.233	0.421	13,435	282,125			
Nov-10	21					23.229	0.428	13,431	282,056			

Dec-10	22						23.226	0.436	13,428		295,414
Jan-11	20						23.222	0.443	13,425		268,492
Feb-11	19						23.219	0.450	13,421		255,005
Mar-11	23						23.215	0.457	13,418		308,614
Apr-11	20						23.212	0.464	13,415		268,294
May-11	21						23.209	0.471	13,411		281,639
Jun-11	22						23.205	0.478	13,408		294,978
Jul-11	20						23.202	0.484	13,405		268,096
Aug-11	23						23.198	0.491	13,402		308,235
Sep-11	21						23.195	0.497	13,398		281,362

Figure A
Aggregate Maximum Offering Prices Subject to Securities Act Section 6(b)
(Dashed Line Indicates Forecast Values)



Appendix B

With the passage of the Investor and Capital Markets Relief Act, Congress has, among other things, established a target amount of monies to be collected from fees charged to investors based on the value of their transactions. This appendix provides the formula for determining such fees, which the Commission adjusts annually, and may adjust semi-annually.[16] In order to maximize the likelihood that the amount of monies targeted by Congress will be collected, the fee rate must be set to reflect projected dollar transaction volume on the securities exchanges and certain over-the-counter markets over the course of the year. As a percentage, the fee rate equals the ratio of the target amounts of monies to the projected dollar transaction volume.

For 2011, the Commission has estimated dollar transaction volume by projecting forward the trend established in the previous decade. More specifically, dollar transaction volume was forecasted for months subsequent to March 2010, the last month for which the Commission has data on transaction volume.

The following sections describe this process in detail.

A. Baseline Estimate of the Aggregate Dollar Amount of Sales for Fiscal Year 2011

First, calculate the average daily dollar amount of sales (ADS) for each month in the sample (March 2000–March 2010). The monthly aggregate dollar amount of sales (exchange plus certain over-the-counter markets) is presented in column C of Table B.

Next, calculate the change in the natural logarithm of ADS from month to month. The average monthly percentage growth of ADS over the entire sample is 0.0025 and the standard deviation is 0.124. Assuming the monthly percentage change in ADS follows a random walk, calculating the expected monthly percentage growth rate for the full sample is straightforward. The expected monthly percentage growth rate of ADS is 1.0%.

Now, use the expected monthly percentage growth rate to forecast total dollar volume. For example, one can use the ADS for March 2010 ($241,886,611,540) to forecast ADS for April 2010 ($244,367,079,739 = $241,886,611,540 × 1.010) [17] Multiply by the number of trading days in April 2010 (21) to obtain a forecast of the total dollar volume for the month ($5,131,708,674,527). Repeat the method to generate forecasts for subsequent months.

The forecasts for total dollar volume are in column G of Table B. The following is a more formal (mathematical) description of the procedure:

1. Divide each month's total dollar volume (column C) by the number of trading days in that month (column B) to obtain the average daily dollar volume (ADS, column D).

2. For each month t, calculate the change in ADS from the previous month as $\Delta_t = \log(ADS_t/ADS_{t-1})$, where log (x) denotes the natural logarithm of x.

3. Calculate the mean and standard deviation of the series $\{\Delta_1, \Delta_2, * * *, \Delta_{120}\}$. These are given by $\mu = 0.0025$ and $\sigma = 0.124$, respectively.

4. Assume that the natural logarithm of ADS follows a random walk, so that Δ_s and Δ_t are statistically independent for any two months s and t.

5. Under the assumption that Δ_t is normally distributed, the expected value of ADS_t/ADS_{t-1} is given by $\exp(\mu + \sigma^2/2)$, or on average $ADS_t = 1.010 \times ADS_{t-1}$.

6. For April 2010, this gives a forecast ADS of $1.010 \times \$241,886,611,540 = \$244,367,079,739$. Multiply this figure by the 21 trading days in April 2010 to obtain a total dollar volume forecast of $5,131,708,674,527.

7. For May 2010, multiply the April 2010 ADS forecast by 1.010 to obtain a forecast ADS of $246,872,984,330. Multiply this figure by the 20 trading days in May 2010 to obtain a total dollar volume forecast of $4,937,459,686,603.

8. Repeat this procedure for subsequent months.

B. Using the Forecasts From A To Calculate the New Fee Rate

1. Use Table B to estimate fees collected for the period 10/1/10 through 10/31/10. The projected aggregate dollar amount of sales for this period is $5,455,658,813,145. Projected fee collections at the current fee rate of 0.0000161 are $92,200,634.

2. Estimate the amount of assessments on securities futures products collected during 10/1/10 and 9/30/11 to be $17,950 by projecting a 1.0% monthly increase from a base of $1,316 in March 2010.

3. Subtract the amounts $92,200,634 and $17,950 from the target offsetting collection

[16] Congress requires that the Commission make a mid-year adjustment to the fee rate if four months into the fiscal year it determines that its forecasts of aggregate dollar volume are reasonably likely to be off by 10% or more.

[17] The value 1.010 has been rounded. All computations are done with the unrounded value.

amount set by Congress of $1,321,000,000 leaving $1,228,781,416 to be collected on dollar volume for the period 11/1/10 through 9/30/11.

4. Use Table B to estimate dollar volume for the period 11/1/10 through 9/30/11. The estimate is $64,133,002,018,766. Finally, compute the fee rate required to produce the additional $1,228,781,416 in revenue. This rate is $1,228,781,416 divided by $64,133,002,018,766 or 0.0000191599.

5. Round the result to the seventh decimal point, yielding a rate of .0000192 (or $19.20 per million).

Table B. Estimation of baseline of the aggregate dollar amount of sales.

Fee rate calculation.

a. Baseline estimate of the aggregate dollar amount of sales, 10/1/10 to 10/31/10 ($Millions)	5,455,659
b. Baseline estimate of the aggregate dollar amount of sales, 11/1/10 to 9/30/11 ($Millions)	64,133,002
c. Estimated collections in assessments on securities futures products in FY 2011 ($Millions)	0.018
d. Implied fee rate (($1,321,000,000 - 0.0000169*a - c)/b)	$19.20

Data

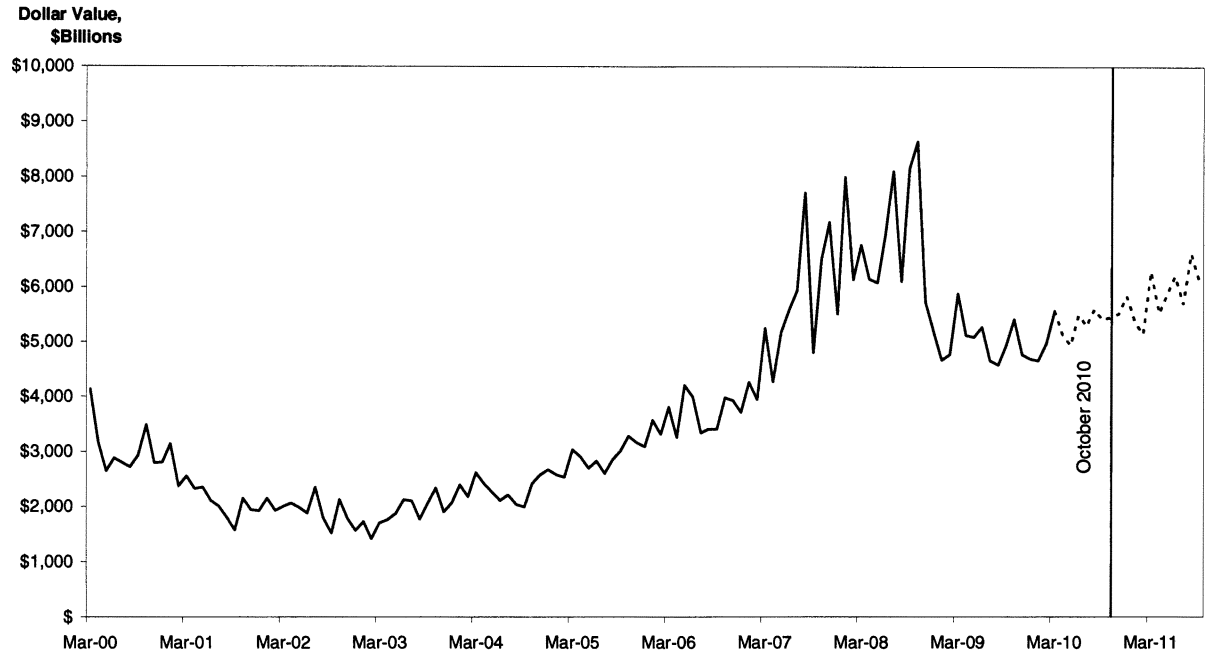
(A) Month	(B) # of Trading Days in Month	(C) Aggregate Dollar Amount of Sales	(D) Average Daily Dollar Amount of Sales (ADS)	(E) Change in LN of ADS	(F) Forecast ADS	(G) Forecast Aggregate Dollar Amount of Sales
Mar-00	23	4,135,152,366,234	179,789,233,315	-		
Apr-00	19	3,174,694,525,687	167,089,185,562	-0.073		
May-00	22	2,649,273,207,318	120,421,509,424	-0.328		
Jun-00	22	2,883,513,997,781	131,068,818,081	0.085		
Jul-00	20	2,804,753,395,361	140,237,669,768	0.068		
Aug-00	23	2,720,788,395,832	118,295,147,645	-0.170		
Sep-00	20	2,930,188,809,012	146,509,440,451	0.214		
Oct-00	22	3,485,926,307,727	158,451,195,806	0.078		
Nov-00	21	2,795,778,876,887	133,132,327,471	-0.174		
Dec-00	20	2,809,917,349,851	140,495,867,493	0.054		
Jan-01	21	3,143,501,125,244	149,690,529,774	0.063		
Feb-01	19	2,372,420,523,286	124,864,238,068	-0.181		
Mar-01	22	2,554,419,085,113	116,109,958,414	-0.073		
Apr-01	20	2,324,349,507,745	116,217,475,387	0.001		
May-01	22	2,353,179,388,303	106,962,699,468	-0.083		
Jun-01	21	2,111,922,113,236	100,567,719,678	-0.062		
Jul-01	21	2,004,384,034,554	95,446,858,788	-0.052		
Aug-01	23	1,803,565,337,795	78,415,884,252	-0.197		
Sep-01	15	1,573,484,946,383	104,898,996,426	0.291		
Oct-01	23	2,147,238,873,044	93,358,211,871	-0.117		
Nov-01	21	1,939,427,217,518	92,353,677,025	-0.011		
Dec-01	20	1,921,098,738,113	96,054,936,906	0.039		
Jan-02	21	2,149,243,312,432	102,344,919,640	0.063		
Feb-02	19	1,928,830,595,585	101,517,399,768	-0.008		
Mar-02	20	2,002,216,374,514	100,110,818,726	-0.014		
Apr-02	22	2,062,101,866,506	93,731,903,023	-0.066		
May-02	22	1,985,859,756,557	90,266,352,571	-0.038		
Jun-02	20	1,882,185,380,609	94,109,269,030	0.042		
Jul-02	22	2,349,564,490,189	106,798,385,918	0.126		
Aug-02	22	1,793,429,904,079	81,519,541,095	-0.270		
Sep-02	20	1,518,944,367,204	75,947,218,360	-0.071		
Oct-02	23	2,127,874,947,972	92,516,302,086	0.197		
Nov-02	20	1,780,816,458,122	89,040,822,906	-0.038		
Dec-02	21	1,561,092,215,646	74,337,724,555	-0.180		
Jan-03	21	1,723,698,830,414	82,080,896,686	0.099		
Feb-03	19	1,411,722,405,357	74,301,179,229	-0.100		
Mar-03	21	1,699,581,267,718	80,932,441,320	0.085		
Apr-03	21	1,759,751,025,279	83,797,667,870	0.035		
May-03	21	1,871,390,985,678	89,113,856,461	0.062		
Jun-03	21	2,122,225,077,345	101,058,337,016	0.126		
Jul-03	22	2,100,812,973,956	95,491,498,816	-0.057		
Aug-03	21	1,766,527,686,224	84,120,366,011	-0.127		
Sep-03	21	2,063,584,421,939	98,265,924,854	0.155		
Oct-03	23	2,331,850,083,022	101,384,786,218	0.031		
Nov-03	19	1,903,726,129,859	100,196,112,098	-0.012		
Dec-03	22	2,066,530,151,383	93,933,188,699	-0.065		
Jan-04	20	2,390,942,905,678	119,547,145,284	0.241		
Feb-04	19	2,177,765,594,701	114,619,241,826	-0.042		
Mar-04	23	2,613,808,754,550	113,643,858,893	-0.009		
Apr-04	21	2,418,663,760,191	115,174,464,771	0.013		
May-04	20	2,259,243,404,459	112,962,170,223	-0.019		

Jun-04	21	2,112,826,072,876	100,610,765,375	-0.116		
Jul-04	21	2,209,808,376,565	105,228,970,313	0.045		
Aug-04	22	2,033,343,354,640	92,424,697,938	-0.130		
Sep-04	21	1,993,803,487,749	94,943,023,226	0.027		
Oct-04	21	2,414,599,088,108	114,980,908,958	0.191		
Nov-04	21	2,577,513,374,160	122,738,732,103	0.065		
Dec-04	22	2,673,532,981,863	121,524,226,448	-0.010		
Jan-05	20	2,581,847,200,448	129,092,360,022	0.060		
Feb-05	19	2,532,202,408,589	133,273,810,978	0.032		
Mar-05	22	3,030,474,897,226	137,748,858,965	0.033		
Apr-05	21	2,906,386,944,434	138,399,378,306	0.005		
May-05	21	2,697,414,503,460	128,448,309,689	-0.075		
Jun-05	22	2,825,962,273,624	128,452,830,619	0.000		
Jul-05	20	2,604,021,263,875	130,201,063,194	0.014		
Aug-05	23	2,846,115,585,965	123,744,155,912	-0.051		
Sep-05	21	3,009,640,645,370	143,316,221,208	0.147		
Oct-05	21	3,279,847,331,057	156,183,206,241	0.086		
Nov-05	21	3,163,453,821,548	150,640,658,169	-0.036		
Dec-05	21	3,090,212,715,561	147,152,986,455	-0.023		
Jan-06	20	3,573,372,724,766	178,668,636,238	0.194		
Feb-06	19	3,314,259,849,456	174,434,728,919	-0.024		
Mar-06	23	3,807,974,821,564	165,564,122,677	-0.052		
Apr-06	19	3,257,478,138,851	171,446,217,834	0.035		
May-06	22	4,206,447,844,451	191,202,174,748	0.109		
Jun-06	22	3,995,113,357,316	181,596,061,696	-0.052		
Jul-06	20	3,339,658,009,357	166,982,900,468	-0.084		
Aug-06	23	3,410,187,280,845	148,269,012,211	-0.119		
Sep-06	20	3,407,409,863,673	170,370,493,184	0.139		
Oct-06	22	3,980,070,216,912	180,912,282,587	0.060		
Nov-06	21	3,933,474,986,969	187,308,332,713	0.035		
Dec-06	20	3,715,146,848,695	185,757,342,435	-0.008		
Jan-07	20	4,263,986,570,973	213,199,328,549	0.138		
Feb-07	19	3,946,799,860,532	207,726,308,449	-0.026		
Mar-07	22	5,245,051,744,090	238,411,442,913	0.138		
Apr-07	20	4,274,665,072,437	213,733,253,622	-0.109		
May-07	22	5,172,568,357,522	235,116,743,524	0.095		
Jun-07	21	5,586,337,010,802	266,016,048,133	0.123		
Jul-07	21	5,938,330,480,139	282,777,641,911	0.061		
Aug-07	23	7,713,644,229,032	335,375,836,045	0.171		
Sep-07	19	4,805,676,596,099	252,930,347,163	-0.282		
Oct-07	23	6,499,651,716,225	282,593,552,879	0.111		
Nov-07	21	7,176,290,763,989	341,728,131,619	0.190		
Dec-07	20	5,512,903,594,564	275,645,179,728	-0.215		
Jan-08	21	7,997,242,071,529	380,821,051,025	0.323		
Feb-08	20	6,139,080,448,887	306,954,022,444	-0.216		
Mar-08	20	6,767,852,332,381	338,392,616,619	0.098		
Apr-08	22	6,150,017,772,735	279,546,262,397	-0.191		
May-08	21	6,080,169,766,807	289,531,893,657	0.035		
Jun-08	21	6,962,199,302,412	331,533,300,115	0.135		
Jul-08	22	8,104,256,787,805	368,375,308,537	0.105		
Aug-08	21	6,106,057,711,009	290,764,652,905	-0.237		
Sep-08	21	8,156,991,919,103	388,428,186,624	0.290		
Oct-08	23	8,644,538,213,244	375,849,487,532	-0.033		
Nov-08	19	5,727,998,341,833	301,473,596,939	-0.221		
Dec-08	22	5,176,041,317,640	235,274,605,347	-0.248		
Jan-09	20	4,670,249,433,806	233,512,471,690	-0.008		
Feb-09	19	4,771,470,184,048	251,130,009,687	0.073		

Mar-09	22	5,885,594,284,780	267,527,012,945	0.063		
Apr-09	21	5,123,665,205,517	243,984,057,406	-0.092		
May-09	20	5,086,717,129,965	254,335,856,498	0.042		
Jun-09	22	5,271,742,782,609	239,624,671,937	-0.060		
Jul-09	22	4,659,599,245,583	211,799,965,708	-0.123		
Aug-09	21	4,582,102,295,783	218,195,347,418	0.030		
Sep-09	21	4,929,155,364,888	234,721,684,042	0.073		
Oct-09	22	5,410,025,301,030	245,910,240,956	0.047		
Nov-09	20	4,770,928,103,032	238,546,405,152	-0.030		
Dec-09	22	4,688,555,313,171	213,116,150,599	-0.113		
Jan-10	19	4,661,795,433,843	245,357,654,413	0.141		
Feb-10	19	4,969,811,812,741	261,569,042,776	0.064		
Mar-10	23	5,563,392,065,417	241,886,611,540	-0.078		
Apr-10	21				244,367,079,739	5,131,708,674,527
May-10	20				246,872,984,330	4,937,459,686,603
Jun-10	22				249,404,586,154	5,486,900,895,390
Jul-10	21				251,962,148,728	5,291,205,123,285
Aug-10	22				254,545,938,271	5,600,010,641,951
Sep-10	21				257,156,223,731	5,400,280,698,352
Oct-10	21				259,793,276,816	5,455,658,813,145
Nov-10	21				262,457,372,020	5,511,604,812,419
Dec-10	22				265,148,786,650	5,833,273,306,292
Jan-11	20				267,867,800,857	5,357,356,017,147
Feb-11	19				270,614,697,668	5,141,679,255,686
Mar-11	23				273,389,763,008	6,287,964,549,176
Apr-11	20				276,193,285,736	5,523,865,714,727
May-11	21				279,025,557,675	5,859,536,711,175
Jun-11	22				281,886,873,637	6,201,511,220,021
Jul-11	20				284,777,531,460	5,695,550,629,206
Aug-11	23				287,697,832,035	6,617,050,136,808
Sep-11	21				290,648,079,339	6,103,609,666,110

Figure B.

Aggregate Dollar Amount of Sales Subject to Exchange Act Sections 31(b) and 31(c)[1]
Methodology Developed in Consultation With OMB and CBO
(Dashed Line Indicates Forecast Values)



[1]Forecasted line is not smooth because the number of trading days varies by month.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61989; File No. SR–NYSEAmex-2010–37]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing of Proposed Rule Change Amending Commentary to Rule 915 and Rule 916

April 27, 2010.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on April 8, 2010, NYSE Amex LLC ("NYSE Amex" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .10 to Rule 915 and Commentary .11 to Rule 916 for the purpose of listing and trading options on the shares of the ETFS Palladium Trust and the ETFS Platinum Trust. The text of the proposed rule change is available on the Commission's Web Site at *http://www.sec.gov.* A copy of this filing is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Recently, the U.S. Securities and Exchange Commission ("SEC" or "Commission") authorized the Exchange to list and trade options on the SPDR Gold Trust[4] ("GLD") the iShares COMEX Gold Trust ("IAU") the iShares Silver Trust ("SLV"),[5] the ETFS Silver Trust ("SIVR") and the ETFS Gold Trust ("SGOL").[6] Now, the Exchange proposes to list and trade options on the ETFS Palladium Trust ("PALL") and the ETFS Platinum Trust ("PPLT").

Currently, Amex Rule 915 deems appropriate for options trading Exchange-Traded Fund Shares ("ETFs" or "Fund Shares") that are traded on a national securities exchange and are defined as an "NMS stock" in Rule 600 of Regulation NMS and that represent (i) Interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that hold portfolios of securities and/or financial instruments including, but not limited to, stock index futures contracts, options on futures, options on securities and indexes, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse purchase agreements (the "Financial Instruments"), and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the "Money Market Instruments") comprising or otherwise based on or representing investments in indexes or portfolios of securities and/or Financial Instruments and Money Market Instruments (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities and/or Financial Instruments and Money Market Instruments); or (ii) interests in a trust or similar entity that holds a specified non-U.S. currency deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency and pays the beneficial owner interest and other distributions on deposited non-U.S. currency, if any, declared and paid by the trust; or (iii) commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency ("Commodity Pool Units"), or (iv) represents an interest in a registered investment company ("Investment Company") organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies, which is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value ("NAV"), and when aggregated in the same specified minimum number, may be redeemed at a holder's request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV ("Managed Fund Share").[7] In addition, pursuant to Commentary .10 to Rule 915 the Exchange may also list options based on shares of GLD, IAU, SLV, SIVR, and SGOL. This proposed rule change seeks to expand the current exception set forth in Commentary .10 to Rule 915 for Exchange-Traded Fund Shares that may be approved for options trading on the Exchange to include PALL and PPLT.

Apart from allowing PALL and PPLT to be underlyings for options traded on the Exchange as described above, the listing standards for Exchange-Traded Fund Shares will remain unchanged from those that apply under current Exchange rules. Exchange-Traded Fund Shares on which options may be listed and traded must still be listed and traded on a national securities exchange and must satisfy the other listing standards set forth in Commentary .06 to Rule 915. Specifically, in addition to satisfying the listing requirements set forth above, Exchange-Traded Fund Shares must meet either (1) the criteria and guidelines under Commentary .01 to Rule 915; or (2) be available for creation or redemption each business day from or through the issuer in cash or in kind at a price related to net asset value, and the issuer must be obligated to issue Exchange-Traded Fund Shares in a specified aggregate number even if some or all of the investment assets required to be deposited have not been

[4] *See* Securities Exchange Act Release No. 57894 (May 30, 2008), 73 FR 32061 (June 5, 2008) (order approving SR–Amex-2008–15).

[5] *See* Securities Exchange Act Release No. 59055 (December 4, 2008), 73 FR 238 [sic] (December 10, 2008) (order approving SR–Amex-2008–68).

[6] *See* Securities Exchange Act Release No. 61483 (February 3, 2010), 75 FR 6753 (February 10, 2010).

[7] *See* Commentary .06 to Rule 915.

received by the issuer, subject to the condition that the person obligated to deposit the investments has undertaken to deliver the investment assets as soon as possible and such undertaking is secured by the delivery and maintenance of collateral consisting of cash or cash equivalents satisfactory to the issuer, as provided in the respective prospectus.

This proposal is intended to provide appropriate standards for the listing and trading of options on PALL and PPLT. The proposed revision to Commentary .11 to Rule 916 specifically provides that shares of PALL and PPLT be deemed "Exchange-Traded Fund Shares" for purposes of Commentary .07 to Rule 916. Under the applicable continued listing criteria in Commentary .07 to Amex Rule 916, the Exchange will consider the suspension of opening transactions in PALL or PPLT in any of the following circumstances: (1) Following the initial twelve-month period beginning upon the commencement of trading of PALL or PPLT, there are fewer than 50 record and/or beneficial holders of PALL or PPLT for 30 or more consecutive trading days; (2) the value of the underlying silver or underlying gold [sic] is no longer calculated or available; or (3) such other event occurs or condition exists that in the opinion of the Exchange makes further dealing on the Exchange inadvisable. In addition, PALL or PPLT shall not be deemed to meet the requirements for continued approval, and the Exchange shall not open for trading any additional series of option contracts of the class covering PALL or PPLT, respectively, if PALL or PPLT ceases to be an "NMS Stock" as provided for in Commentary .07(2) to Rule 916 or PALL or PPLT is halted from trading on the primary listing market, or if PALL or PPLT is delisted.

The Exchange represents that the listing and trading of PALL options or PPLT options under NYSE Amex rules will not have any effect on the rules pertaining to position and exercise limits [8] or margin.[9]

The Exchange represents that it has an adequate surveillance program in place for options on PALL and PPLT. The Exchange may obtain trading information via the Intermarket Surveillance Group ("ISG") from other exchanges who are members or affiliates of the ISG. The Exchange may also obtain trading information from various commodity futures exchanges worldwide that have entered into comprehensive surveillance sharing agreements with the Exchange. In connection with PALL and PPLT, the Exchange represents that it may obtain information from the New York Mercantile Exchange, Inc. ("NYMEX"), pursuant to a comprehensive surveillance sharing agreement, related to any financial instrument that is based, in whole or in part, upon an interest in or performance of silver or gold [sic]. Prior to listing and trading options on PALL or PPLT, the Exchange represents that it will either have the ability to obtain specific trading information via ISG or through a comprehensive surveillance sharing agreement with the marketplace or marketplaces with last sale reporting that represent(s) the highest volume in derivatives (options or futures) on the underlying palladium or platinum.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) [10] of the Securities Exchange Act of 1934 (the "Act"), in general, and furthers the objectives of Section 6(b)(5) [11] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File No. SR–NYSEAmex–2010–37 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File No. SR–NYSEAmex–2010–37. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NYSE Amex. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No.

[8] *See* NYSE Amex Rules 904 and 905.

[9] *See* NYSE Amex Rule 462.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

SR–NYSEAmex–2010–37 and should be submitted on or before May 26, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–10458 Filed 5–4–10; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61987; File No. SR–C2–2010–001]

Self-Regulatory Organizations; C2 Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Certain Order Routing and Market-Maker Rules

April 27, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 23, 2010, C2 Options Exchange, Incorporated ("Exchange" or "C2") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a rule relating to order routing to other exchanges and to adopt preferred market-maker rules. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal*), at the Exchange's Office of the Secretary and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, C2 included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

C2 was recently registered as a national securities exchange under Section 6 of the Exchange Act.[5] When operational, C2 will operate an all-electronic marketplace for the trading of listed options. It will not maintain a physical trading floor. C2 is filing this proposed rule change in order to add a linkage order routing rule. The rule is identical to a rule adopted by the Chicago Board Options Exchange, Incorporated ("CBOE") as part of the transition to the new intermarket linkage plan (the Options Order Protection and Locked/Crossed Market Plan). Under the new linkage, exchanges ensure order protection by routing orders to other markets through broker-dealers. The proposed rule adopts certain guidelines that would be applicable to any routing services provided by C2 through a broker-dealer. Routing services would be available to C2 permit holders only and are optional. Permit holders that do not want orders routed can use the Immediate or Cancel designation to avoid routing.

As proposed, routing services will only be provided by routing brokers that are not affiliated with the Exchange. Further, the Exchange may not use a routing broker for which the Exchange or any affiliate of the Exchange is the designated examining authority. For each routing broker used by the Exchange, an agreement will be in place between the Exchange and the routing broker that will, among other things, restrict the use of any confidential and proprietary information that the routing broker receives to legitimate business purposes necessary for routing orders at the direction of the Exchange.

The rule further requires the Exchange to provide routing services in compliance with the Securities Exchange Act of 1934 and the rules thereunder, including, but not limited to, the requirements in Section 6(b)(4) and (5) of the Act that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The rule also requires the Exchange to establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and the routing broker, and any other entity, including any affiliate of the routing broker, and, if the routing broker or any of its affiliates engages in any other business activities other than providing routing services to the Exchange, between the segment of the routing broker or affiliate that provides the other business activities and the segment of the routing broker that provides the routing services.

Under the proposed rule, the Exchange will determine the logic that provides when, how, and where orders are routed away to other exchanges. Further, the routing broker cannot change the terms of an order or the routing instructions, nor does the routing broker have any discretion about where to route an order. Lastly, the rule provides that any bid or offer entered on the Exchange routed to another exchange via a routing broker that results in an execution shall be binding on the member that entered such bid/offer.

The filing also proposes to adopt a Preferred Market-Maker rule and a participation entitlement for Preferred Market-Makers (PMMs). The proposed additions are virtually identical to rules governing the PMM program on CBOE. A PMM program allows order senders to designate a preferred Market-Maker for orders sent to the Exchange. If the PMM meets certain requirements at the time the order is received, the PMM is entitled to an enhanced participation on the trade (a participation entitlement). Adopting a PMM program will provide C2 with greater flexibility in attracting dedicated liquidity providers.

Proposed Rule 8.13 provides that the Exchange may allow, on a class-by-class basis, for the receipt orders that carry a designation specifying a Market-Maker in that class as the "Preferred Market-Maker" for that order. The PMM will receive a participation entitlement for such order if the following provisions are met: (i) The PMM is registered in the relevant option class; and (ii) the PMM is quoting at the best bid/offer on the Exchange. The participation entitlement shall be 40% when there are two or more Market-Makers also quoting at the

[12] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] *See* Exchange Act Release No. 61152 (Dec. 10, 2009), 74 FR 66699 (Dec. 16, 2009).

NBBO on the Exchange, and 50% when there is only one other Market-Maker quoting at the NBBO on the Exchange. In addition: (i) A PMM may not be allocated a total quantity greater than the quantity that the PMM is quoting at the best bid/offer on the Exchange; (ii) the participation entitlement rate is based on the number of contracts remaining after all public customer orders in the book at the best bid/offer on the Exchange have been satisfied; and (iii) if a Preferred Market-Maker receives a PMM participation entitlement, then no other participation entitlements shall apply to such order.

PMMs will be subject to heightened quoting requirements. More specifically, PMMs must comply with the quoting obligations applicable under Exchange rules and must provide continuous electronic quotes in at least 90% of the series of each class for which it receives Preferred Market-Maker orders.[6]

Proposed Rule 8.13 also allows the Exchange to implement a PMM program for complex orders. The program is substantially similar to the program for straight orders and is identical to the program in place for CBOE.

Corresponding changes to Rule 6.12 are also proposed to ensure that the order execution and priority rule contemplates a participation entitlement for PMMs.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Exchange Act in general and furthers the objectives of Section 6(b)(5) in particular in that, by making the linkage process more efficient and ensuring certain safeguards are in place when routing firms are used, it should promote just and equitable principles of trade, serve to remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. Moreover, the Exchange believes that adopting these rules will facilitate the trading of options in a national market system by establishing more transparent routing guidelines, and will facilitate the ability of preferred Market-Makers to provide deeper liquidity.

B. Self-Regulatory Organization's Statement on Burden on Competition

C2 does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposal.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule does not (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6) thereunder.[8] At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–C2–2010–001 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–C2–2010–001. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission,[9] all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of C2. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–C2–2010–001 and should be submitted on or before May 26, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–10459 Filed 5–4–10; 8:45 am]

BILLING CODE 8010–01–P

[6] Under Rule 8.5(a)(1), C2 Market-Makers must maintain a continuous (99% of the time) two-sided market in 60% of the series of each registered class that have time to expiration of less than nine months.

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] The text of the proposed rule change is available on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[10] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6598]

U.S. National Commission for UNESCO Notice of Meeting

The 2010 Annual Meeting of the U.S. National Commission for the United Nations Educational, Scientific, and Cultural Organization (UNESCO) will take place on Wednesday, May 26, 2010 and Thursday, May 27, 2010, at the Embassy Suites in Washington, DC (900 10th Street, NW.). On Wednesday, May 26 from 9 a.m. to 12 p.m. and from 2 p.m. to approximately 6:30 p.m., the Commission will hold a series of

informational plenary sessions and subject-specific committee and thematic breakout sessions, which will be open to the public. Additionally, on Thursday, May 27, the Commission will meet from 9 a.m. until approximately 1 p.m. to discuss final recommendations, which also will be open to the public. Members of the public who wish to attend any of these meetings or who need reasonable accommodation should contact the U.S. National Commission for UNESCO no later than Wednesday, May 19th for further information about admission, as seating is limited. Those who wish to make oral comments during the public comment section held during the concluding session Tuesday should request to be scheduled by Thursday, May 20th. Each individual will be limited to five minutes, with the total oral comment period not exceeding thirty minutes. Written comments should be submitted by Tuesday, May 18th to allow time for distribution to the Commission members prior to the meeting. The National Commission may be contacted via e-mail at *DCUNESCO@state.gov,* or via phone at (202) 663–0026.

Dated: April 28, 2010.

Elizabeth Kanick,

Executive Director, U.S. National Commission for UNESCO, Department of State.

[FR Doc. 2010–10548 Filed 5–4–10; 8:45 am]

BILLING CODE 4710–19–P

DEPARTMENT OF TRANSPORTATION

Bureau of Transportation Statistics

Research and Innovative Technology Administration Advisory Council on Transportation Statistics; Notice of Meeting

AGENCY: Research and Innovative Technology Administration, U.S. Department of Transportation.

ACTION: Notice.

This notice announces, pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (FACA) (Pub. L. 72–363; 5 U.S.C. app. 2), a meeting of the Advisory Council on Transportation Statistics (ACTS). The meeting will be held on Friday, June 4, 2010, from 9 a.m. to 5 p.m. EST in the Oklahoma City Room at the U.S. Department of Transportation, 1200 New Jersey Ave., SE. Washington, DC.

Section 5601(o) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) directs the U.S. Department of Transportation to establish an Advisory Council on Transportation Statistics subject to the Federal Advisory Committee Act (5 U.S.C., App.2) to advise the Director of BTS on the quality, reliability, consistency, objectivity, and relevance of transportation statistics and analyses collected, supported, or disseminated by the Bureau and the Department.

The following is a summary of the draft meeting agenda: (1) USDOT Welcome and introduction of council members; (2) Overview of prior meeting; (3) Advisory Council Members Interest Areas; and (4) Council Members review and discussion of statistical programs. Participation is open to the public. Members of the public who wish to participate must notify Tonya Tinsley at *tonya.tinsley@dot.gov,* not later than May 25, 2010. Members of the public may present oral statements at the meeting with the approval of Steven D. Dillingham, Director of the Bureau of Transportation Statistics. Non-committee members wishing to present oral statements or obtain information should contact Ms. Tinsley via e-mail no later than May 30, 2010.

Questions about the agenda or written comments may be e-mailed or submitted by U.S. Mail to: U.S. Department of Transportation, Research and Innovative Technology Administration, Bureau of Transportation Statistics, Attention: Tonya Tinsley, 1200 New Jersey Avenue, SE., Room # E34–403, Washington, DC 20590, *tonya.tinsley@dot.gov* or faxed to (202) 366–3640. BTS requests that written comments be received by June 1, 2010.

Notice of this meeting is provided in accordance with the FACA and the General Services Administration regulations (41 CFR part 102–3) covering management of Federal advisory committees.

Issued in Washington, DC, on the 28 day of April 2010.

Steven D. Dillingham,

Director, Bureau of Transportation Statistics.

[FR Doc. 2010–10508 Filed 5–4–10; 8:45 am]

BILLING CODE 4910–HY–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Additional Designations, Foreign Narcotics Kingpin Designation Act

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control ("OFAC") is publishing the names of four individuals whose property and interests in property have been blocked pursuant to the Foreign Narcotics Kingpin Designation Act ("Kingpin Act") (21 U.S.C. 1901–1908, 8 U.S.C. 1182).

DATES: The designation by the Director of OFAC of the four individuals identified in this notice pursuant to section 805(b) of the Kingpin Act is effective on April 27, 2010.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available on OFAC's Web site (*http://www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, tel.: (202) 622–0077.

Background

The Kingpin Act became law on December 3, 1999. The Kingpin Act establishes a program targeting the activities of significant foreign narcotics traffickers and their organizations on a worldwide basis. It provides a statutory framework for the President to impose sanctions against significant foreign narcotics traffickers and their organizations on a worldwide basis, with the objective of denying their businesses and agents access to the U.S. financial system and the benefits of trade and transactions involving U.S. companies and individuals.

The Kingpin Act blocks all property and interests in property, subject to U.S. jurisdiction, owned or controlled by significant foreign narcotics traffickers as identified by the President. In addition, the Secretary of the Treasury consults with the Attorney General, the Director of the Central Intelligence Agency, the Director of the Federal Bureau of Investigation, the Administrator of the Drug Enforcement Administration, the Secretary of Defense, the Secretary of State, and the Secretary of Homeland Security when designating and blocking the property and interests in property, subject to U.S. jurisdiction, of persons who are found to be: (1) Materially assisting in, or providing financial or technological support for or to, or providing goods or services in support of, the international narcotics trafficking activities of a person designated pursuant to the Kingpin Act; (2) owned, controlled, or directed by, or acting for or on behalf of, a person designated pursuant to the

Kingpin Act; or (3) playing a significant role in international narcotics trafficking.

On April 27, 2010, the Director of OFAC designated four individuals whose property and interests in property are blocked pursuant to section 805(b) of the Foreign Narcotics Kingpin Designation Act.

The list of additional designees is as follows:

Individuals:

1. LORENZANA LIMA, Waldemar (a.k.a. LORENZANA LIMA, Valdemar); La Reforma, Zacapa, Guatemala; DOB 19 Feb 1940; POB Guatemala; Citizen Guatemala; Nationality Guatemala; Cedula No. R–1900001817 (Guatemala); (INDIVIDUAL) [SDNTK].

2. LORENZANA CORDON, Waldemar (a.k.a. LORENZANA CORDON, Valdemar); Zacapa, Guatemala; DOB 25 Apr 1965; POB Guatemala; Citizen Guatemala; Nationality Guatemala; Cedula No. R–1900003298 (Guatemala); (INDIVIDUAL) [SDNTK].

3. LORENZANA CORDON, Haroldo Geremias (a.k.a. LORENZANA CORDON, Haroldo Jeremias; a.k.a. "Chuchi"; a.k.a. "Chuchy"); La Reforma, Zacapa, Guatemala; DOB 04 Jun 1966; POB Guatemala; Citizen Guatemala; Nationality Guatemala; Cedula No. R–19 3649 (Guatemala); (INDIVIDUAL) [SDNTK].

4. LORENZANA CORDON, Eliu Elixander, La Reforma, Zacapa, Guatemala; DOB 29 Nov 1971; POB Guatemala; Citizen Guatemala; Nationality Guatemala; Cedula No. R–19 4478 (Guatemala); (INDIVIDUAL) [SDNTK].

Dated: April 27, 2010.

Adam J. Szubin,

Director, Office of Foreign Assets Control.

[FR Doc. 2010–10481 Filed 5–4–10; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Interagency Guidance on Asset Securitization Activities

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. The Office of Thrift Supervision within the Department of the Treasury will submit the proposed information collection requirement described below to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. Today, OTS is soliciting public comments on its proposal to extend this information collection.

DATES: Submit written comments on or before July 6, 2010.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW. Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to *infocollection.comments@ots.treas.gov*. OTS will post comments and the related index on the OTS Internet Site at *http://www.ots.treas.gov*. In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW. by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *public.info@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: You can request additional information about this proposed information collection from William Magrini (202) 906–5744, Office of Thrift Supervision, 1700 G Street, NW. Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Comments should address one or more of the following points:

a. Whether the proposed collection of information is necessary for the proper performance of the functions of OTS;

b. The accuracy of OTS's estimate of the burden of the proposed information collection;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of the information collection on respondents, including through the use of information technology.

We will summarize the comments that we receive and include them in the OTS request for OMB approval. All comments will become a matter of public record. In this notice, OTS is soliciting comments concerning the following information collection.

Title of Proposal: Interagency Guidance on Asset Securitization Activities.

OMB Number: 1550–0104.

Regulation Requirements: 12 CFR part 570.

Form Number: N/A.

Description: Institution management will use these information collections as the basis for the safe and sound operation of their asset securitization activities and to ensure that they minimize operational risk in these activities. OTS will use this information to evaluate the quality of an institution's risk management practices. OTS will also use the information to assist institutions without proper supervision of their asset securitization activities to implement corrective action to conduct these activities in a safe and sound manner.

Type of Review: Extension of a currently approved collection.

Affected Public: Businesses or other for-profit.

Estimated Number of Respondents: 15.

Estimated Burden Hours per Responses: 20 hours.

Estimated Frequency of Response: On occasion.

Estimated Total Burden: 300 hours.

Dated: April 30, 2010.

Ira L. Mills,

Paperwork Clearance Officer, Office of Chief Counsel, Office of Thrift Supervision.

[FR Doc. 2010–10551 Filed 5–4–10; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[AC–36 OTS Nos. 08193 and H4677]

Fairmount Bank, Baltimore, MD; Approval of Conversion Application

Notice is hereby given that on April 15, 2010, the Office of Thrift Supervision approved the application of Fairmount Bank, Baltimore, Maryland, to convert to the stock form of organization. Copies of the application are available for inspection by appointment (*phone number:* (202) 906–5922 or *e-mail: public.info@ots.treas.gov*) at the Public Reading Room, 1700 G Street, NW., Washington, DC 20552, and the OTS Southeast Regional Office, 1475 Peachtree Street, NE., Atlanta, Georgia 30309.

Dated: April 27, 2010.

By the Office of Thrift Supervision.

Sandra E. Evans,

Federal Register Liaison.

[FR Doc. 2010–10227 Filed 5–4–10; 8:45 am]

BILLING CODE 6720–01–M

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

[Docket ID: OTS–2010–0014]

Open Meeting of the OTS Mutual Savings Association Advisory Committee

AGENCY: Department of the Treasury, Office of Thrift Supervision.

ACTION: Notice of meeting.

SUMMARY: The OTS Mutual Savings Associations Advisory Committee (MSAAC) will convene a telephonic meeting on Friday, May 21, 2010, beginning at 2 p.m. Eastern Time. The telephonic meeting will be open to the public. Members of the public interested in listening to the meeting and members of the public who require auxiliary aid should e-mail OTS at *mutualcommittee@ots.treas.gov* or call (202) 906–6429 to obtain information on how to attend the meeting.

DATES: The telephonic meeting will be held on Friday, May 21, 2010, at 2 p.m. Eastern Time.

ADDRESSES: The meeting will be a telephonic meeting. The public is invited to submit written statements to the MSAAC by any one of the following methods:

- *E-mail address: mutualcommittee@ots.treas.gov;* or
- *Mail:* To Charlotte Bahin, Designated Federal Official, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552 in triplicate. The agency must receive statements no later than May 17, 2010.

FOR FURTHER INFORMATION CONTACT: Charlotte M. Bahin, Designated Federal Official, (202) 906–6452, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: By this notice, the Office of Thrift Supervision is announcing that the OTS Mutual Savings Association Advisory Committee will convene a telephonic meeting on Friday, May 21, 2010, beginning at 2 p.m. Eastern Time. The meeting will be open to the public. Anyone wishing to attend the meeting, and members of the public who require auxiliary aid, must contact the Office of Thrift Supervision at 202–906–6429 or *mutualcommittee@ots.treas.gov* by 5 p.m. Eastern Time on Monday, May 17, 2010, to inform OTS of his or her desire to attend the meeting and to obtain information on how to attend the meeting. The purpose of the meeting is to advise OTS on what regulatory changes or other steps OTS may be able to take to ensure the continued health and viability of mutual savings associations, and other issues of concern to the existing mutual savings associations.

Dated: April 29, 2010.

By the Office of Thrift Supervision.

Deborah Dakin,

Acting Chief Counsel.

[FR Doc. 2010–10550 Filed 5–4–10; 8:45 am]

BILLING CODE P

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Public Hearing

AGENCY: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open public hearing—June 9, 2010, Washington, DC.

SUMMARY: Notice is hereby given of the following hearing of the U.S.-China Economic and Security Review Commission.

Name: Daniel M. Slane, Chairman of the U.S.-China Economic and Security Review Commission.

The Commission is mandated by Congress to investigate, assess, and report to Congress annually on "the national security implications of the economic relationship between the United States and the People's Republic of China."

Pursuant to this mandate, the Commission will hold a public hearing in Washington, DC, on June 9, 2010, titled "Evaluating China's Role in the World Trade Organization over the Past Decade."

Background

This is the sixth public hearing the Commission will hold during its 2010 report cycle to collect input from leading academic, industry, and government experts on national security implications of the U.S. bilateral trade and economic relationship with China. The June 9 hearing will examine the economic, political and security implications of China's entry into the WTO and China's compliance with WTO rules. The June 9 hearing will be Co-chaired by Chairman Daniel M. Slane and Commissioner Patrick A. Mulloy.

Any interested party may file a written statement by June 9, 2010, by mailing to the contact below. On June 9, the hearing will be held in two sessions, one in the morning and one in the afternoon. A portion of each panel will include a question and answer period between the Commissioners and the witnesses.

Transcripts of past Commission public hearings may be obtained from the USCC Web Site *http://www.uscc.gov.*

Date and Time: Thursday, June 9, 2010, 8:15 a.m. to 4:30 p.m. Eastern Daylight Time. A detailed agenda for the hearing will be posted to the Commission's Web Site at *http://www.uscc.gov* as soon as available.

ADDRESSES: The hearing will be held on Capitol Hill in Room 562 of the Dirksen Senate Office Building located at First Street and Constitution Avenue, NE., Washington, DC 20510. Public seating is limited to about 50 people on a first come, first served basis. Advance reservations are not required.

FOR FURTHER INFORMATION CONTACT: Any member of the public wishing further information concerning the hearing should contact Kathy Michels, Associate Director for the U.S.-China Economic and Security Review Commission, 444 North Capitol Street, NW., Suite 602, Washington, DC 20001; phone: 202–624–1409, or via e-mail at *kmichels@uscc.gov.*

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005).

Dated: April 29, 2010.

Kathleen J. Michels,

Associate Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2010–10454 Filed 5–4–10; 8:45 am]

BILLING CODE 1137–00–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Prosthetics and Special Disabilities Programs; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 (Federal Advisory Committee Act) that a meeting of the Advisory Committee on Prosthetics and Special Disabilities Programs (the "Committee") will be held May 4–5, 2010, in Room 930, at VA Central Office, 810 Vermont Avenue, NW., Washington, DC. The sessions will convene at 8:30 a.m. on

both days and will adjourn at 4:30 p.m. on May 4 and noon on May 5. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on VA's prosthetic programs designed to provide state-of-the-art prosthetics and the associated rehabilitation research, development, and evaluation of such technology. The Committee also provides advice to the Secretary on special disability programs which are defined as any program administered by the Secretary to serve Veterans with spinal cord injury, blindness or visual impairment, loss of extremities or loss of function, deafness or hearing impairment, and other serious incapacities in terms of daily life functions.

On May 4, the Committee will have its annual ethics briefing by the Office of General Counsel and be briefed by the Director, Audiology and Speech Pathology Service, Chief Consultant for Spinal Cord Injury and Disorders, Chief Consultant for Care Coordination, Director of Blind Rehabilitation Service, and the Chief Consultant for Mental Health Services. On May 5, the Committee will be briefed by the Director of VA's Podiatric Services and the Office of Construction and Facilities Management.

No time will be allocated for receiving oral presentations from the public. However, members of the public may direct questions or submit written statements for review by the Committee in advance of the meeting to Mr. Larry N. Long, Designated Federal Officer, Veterans Health Administration, Patient Care Services, Rehabilitation Services (117D), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or by e-mail at *lonlar@va.gov.* Any member of the public wishing to attend the meeting should contact Mr. Long at (202) 461–7354.

Dated: April 29, 2010.

By Direction of the Secretary.

Vivian Drake,

Acting Committee Management Officer.

[FR Doc. 2010–10441 Filed 5–4–10; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Wednesday,
May 5, 2010

Part II

The President

Notice of May 3, 2010—Continuation of the National Emergency With Respect to the Actions of the Government of Syria

Federal Register
Vol. 75, No. 86
Wednesday, May 5, 2010

Presidential Documents

Title 3—

The President

Notice of May 3, 2010

Continuation of the National Emergency With Respect To the Actions of the Government of Syria

On May 11, 2004, pursuant to his authority under the International Emergency Economic Powers Act, 50 U.S.C. 1701–1706, and the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, Public Law 108–175, the President issued Executive Order 13338, in which he declared a national emergency with respect to the actions of the Government of Syria. To deal with this national emergency, Executive Order 13338 authorized the blocking of property of certain persons and prohibited the exportation or re-exportation of certain goods to Syria. On April 25, 2006, and February 13, 2008, the President issued Executive Order 13399 and Executive Order 13460, respectively, to take additional steps with respect to this national emergency.

The President took these actions to deal with the unusual and extraordinary threat to the national security, foreign policy, and economy of the United States constituted by the actions of the Government of Syria in supporting terrorism, maintaining its then existing occupation of Lebanon, pursuing weapons of mass destruction and missile programs, and undermining U.S. and international efforts with respect to the stabilization and reconstruction of Iraq.

While the Syrian government has made some progress in suppressing networks of foreign fighters bound for Iraq, its actions and policies, including continuing support for terrorist organizations and pursuit of weapons of mass destruction and missile programs, continue to pose an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States. As a result, the national emergency declared on May 11, 2004, and the measures adopted on that date, on April 25, 2006, in Executive Order 13399, and on February 13, 2008, in Executive Order 13460, to deal with that emergency must continue in effect beyond May 11, 2010. Therefore, in accordance with section 202(d) of the National Emergencies Act, 50 U.S.C. 1622(d), I am continuing for 1 year the national emergency declared with respect to certain actions of the Government of Syria. The United States will consider changes in the policies and actions of the Government of Syria in determining whether to continue or terminate this national emergency in the future and would welcome progress by the Government of Syria on these matters.

This notice shall be published in the *Federal Register* and transmitted to the Congress.

THE WHITE HOUSE,
May 3, 2010.

[FR Doc. 2010–10786
Filed 5–4–10; 11:15 am]
Billing code 3195–W0–P

Reader Aids

Federal Register

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Reference questions. Send questions and comments about the Federal Register system to: **fedreg.info@nara.gov**

The Federal Register staff cannot interpret specific documents or regulations.

Reminders. Effective January 1, 2009, the Reminders, including Rules Going Into Effect and Comments Due Next Week, no longer appear in the Reader Aids section of the Federal Register. This information can be found online at **http://www.regulations.gov.**

CFR Checklist. Effective January 1, 2009, the CFR Checklist no longer appears in the Federal Register. This information can be found online at **http://bookstore.gpo.gov/.**

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H.R. 5147/P.L. 111–161

Airport and Airway Extension Act of 2010 (Apr. 30, 2010; 124 Stat. 1126)

S. 3253/P.L. 111–162

To provide for an additional temporary extension of programs under the Small Business Act and the Small Business Investment Act of 1958, and for other purposes. (Apr. 30, 2010; 124 Stat. 1129)

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